No. 08- 081245

IN THE

Supreme Court of the United States

NATIONAL TAXPAYERS UNION,

Petitioner,

v.

UNITED STATES SOCIAL SECURITY ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAMES E. MCCOLLUM, JR.
MCCOLLUM AND ASSOCIATES, LLC
7309 Baltimore Avenue
Suite 117
College Park, MD 20741
(301) 864-6070

MICHAEL E. GELTNER
Counsel of Record
GELTNER AND ASSOCIATES, PC
105 North Virginia Avenue
Suite 305
Falls Church, VA 22046
(703) 536-2334

Attorneys for Petitioner

221208

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

May the Third and Fourth Circuits overrule the holding of *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600 (2003) ("*Telemarketing Associates*") that the First Amendment allows punishment of charitable solicitation ***only*** for actual fraud?

TABLE OF CONTENTS

Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Cited Authorities

Other Authorities:

Cited Authorities

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is not yet officially reported. It is reported so far at 2008 U.S. App. LEXIS 25802, 2008 WL 5175066 (3d Cir. 2008).

The decision of the Department of Health and Human Services Departmental Appeals Board is reported at *Social Security Administration v. National Taxpayers Union*, CR No. 1543, 2006 HHSDAB LEXIS 209 (2006). Petitioner has been unable to find any official reports for this agency.

JURISDICTION

A. Timeliness

The decision of the Court of Appeals sought to be reviewed was entered on December 11, 2008.[1] Petitioner filed a timely petition for rehearing to the panel of the Court of Appeals which was denied by order entered January 9, 2009.[2]

B. Jurisdiction

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari under 28 U.S.C. §1254, which is cross referenced as the applicable review provision for cases such as this one in 42 U.S.C. §1320a-7a (e).

---

1. 1a

2. 58a

C. Notice

The Solicitor General of the United States has been served in compliance with Rule 29.4(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. First Amendment to the United States Constitution (Excerpt)

> Congress shall make no law . . . abridging the freedom of speech . . .

B. 42 U.S.C. §1320b-10(a) (1), Social Security Act §1140 ("§1140"), as amended (Excerpt)

> No person may use, in connection with any item constituting an advertisement, solicitation, circular, book, pamphlet or other communication . . . , alone or with other words, symbols or emblems—(A) the words 'Social Security' . . . in a manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that such item is approved, endorsed or authorized by the Social Security Administration . . .

STATEMENT OF THE CASE

A. Basis for Jurisdiction in the Court of Appeals

42 U.S.C. §1320b-10(c)(1), part of §1140, incorporates by reference 42 U.S.C. 1320a-7a(e), which provides for judicial review by petition for review of final agency decisions imposing monetary penalties in the United States Court of Appeals where the agency respondent resides, which is interpreted for a corporation as the state of incorporation. See *Federal Power Comm'n v. Texaco, Inc.*, 377 U.S. 33 (1964). Since petitioner is a Delaware not for profit corporation, this provides for review in the United States Court of Appeals for the Third Circuit. Petitioner filed a timely petition for review in the United States Court of Appeals for the Third Circuit after the agency decision, thus conferring jurisdiction on that court.

B. Facts

1. The Mailings

Petitioner National Taxpayers Union ("NTU") is a charitable organization, specifically, a Delaware not for profit corporation registered as a charity under §501(c) of the Internal Revenue Code. NTU has functioned, since its founding in 1973, as a taxpayer advocacy group, with many successes, such as the Taxpayers Bill of Rights. In 2001, NTU's board of directors decided to take a position in support of private investment accounts for social security, and, thereafter, NTU mailed copies of a direct mail solicitation on the subject. The solicitation contained a survey and advocated for private

investment accounts and also included a summary of the background of NTU as an organization. It also contained the words, "Social Security," on the envelope and statement that it was an official survey for the President, Congress and Social Security Administration.

2. Proceedings

a. Agency

Respondent Social Security Administration ("SSA") sent NTU a letter imposing a $274,582 monetary penalty under §1140. NTU then invoked the agency's administrative review procedure by filing a request for a hearing. NTU's hearing request included a claim that §1140 was unconstitutional as applied under the First Amendment, because it punished charitable solicitation without a finding of actual fraud.[3]

The agency conducted a hearing before the Department of Health and Human Services Departmental Appeals Board ("HHS DAB") Civil Remedies Division. In a prior case, *SSA v. Nat'l Fed'n of Retired Persons*, ("*Retired Persons*"),[4] HHS DAB's Appellate Division (1) ruled that HHS DAB would not consider unconstitutional as applied claims and (2) broadly interpreted §1140 and held that §1140 had two liability standards—(i) a knowledge standard ("knows or should know"), which HHS DAB interpreted

---

3. Request for Hearing in record below.

4. Excerpts from *Retired Persons* are in Appendix starting at 60a. The entire opinion is in the record below.

as ***mere negligence***,[5] and (ii) a "reasonableness standard,"[6] which HHS DAB interpreted as strict liability ***not even requiring a false statement***.[7] The agency itself has referred to its interpretation of §1140 as setting a "uniquely low threshold of liability." See *Social Security Admin. v. United Seniors Ass'n, Inc.*, 2003 HHSDAB LEXIS 110 at *10 (2003). See also, *id.* at *8 (§1140 "creates a very low threshold for liability.").

Following *Retired Persons*, the ALJ in this case refused to consider NTU's as applied challenge and affirmed SSA's $274,582 monetary penalty based on findings that NTU's solicitations violated the "knowledge" standard[8] and the "reasonableness" standard, relying on *Retired Persons*.[9] The ALJ made ***no*** finding that NTU had committed actual fraud.[10] Thereafter, NTU sought review in the HHSDAB Appellate Division, which took no action,[11] after which the Commissioner's inaction resulted in the HHS DAB decision becoming final.

---

5. 63a ("Section 1140's knowledge standard is in fact a negligence standard.").

6. 62a.

7. 62a (". . . section 1140 does not require a factual misrepresentation or proof that some person was actually deceived . . .").

8. 44a

9. 28a

10. 18a (ALJ opinion).

11. 15a

b. Appellate Review

(i) Petition for Review

NTU filed a timely petition for review in the United States Court of Appeals for the Third Circuit. NTU argued, *inter alia*, that the imposition of a penalty on it for a charitable solicitation violated the First Amendment, as applied, because this Court had established the rule in the *Schaumburg* line of cases, culminating in *Telemarketing Associates*, *supra*,[12] that proof of actual fraud was the *sine qua non* to punish charitable speech. In 2005, the Fourth Circuit had rejected this position in denying a First Amendment claim. See *United Seniors Ass'n., Inc. v. Social Security Administration*, 423 F. 3d 397 (4th Cir. 2005), cert. denied, 547 U.S. 1162 (2006) ("*United Seniors*"). See 423 F. 3d 407 (One who "should have known that the message conveyed the false impression of governmental endorsement". . . "is not entitled to First Amendment protection."). NTU argued to the Third Circuit, *inter alia*, that *United Seniors* was wrongly decided and violated the clear statement that this Court had made in *Telemarketing Associates* that the "exacting proof requirements" of a common law deceit or fraud claim are required to provide "sufficient breathing room for protected speech." 538 U.S. at 620. NTU also relied on these cases to claim full First Amendment protection

12. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) ("*Schaumburg*"); *Secretary of State of Maryland v. Jos. H. Munson Co.*, 467 U.S. 947 (1984); *Riley v. Nat'l Wildlife Fed'n*, 487 U.S. 781 (1988) ("*Riley*"); *Telemarketing Associates*, *supra*.

for its mailings; "[o]ur prior cases teach that the solicitation of charitable contributions is protected speech." *Riley, supra*, 487 U.S. at 789.

(ii) The Third Circuit's Decision.

The Court of Appeals denied NTU's petition for review in an opinion authored by Circuit Judge Fuentes marked "not precedential."[13] The opinion's response to NTU's argument that §1140 violated the First Amendment, as applied, because it "penalizes the organization's speech without finding 'actual intent to defraud,'" was that "[t]his assertion requires little analysis, because it is based on an incorrect reading of [*Schaumburg*]."[14] The Court then read *Schaumburg* to allow punishment with no proof of fraud where the government has a "sufficiently strong subordinating interest,"[15] finding that countervailing governmental interest in Congress' desire to be sure recipients open government mail.[16] The Court said that "[m]ail that appears to be from the Social Security Administration piques beneficiaries' interest and induces them to read and respond accordingly,"[17] which the Court felt violated Congress' purpose "to protect seniors and other beneficiaries from fraud."[18] However, the Court of Appeals ignored the fact that SSA conceded before the

13. 1a

14. 5a

15. 5a

16. 5a-6a

17. 5a

18. *Id.*

Agency that NTU's survey solicitation did ***not*** look like government mail.[19]

Judge Fuentes read *Telemarketing Associates*' holding that *fraudulent* charitable solicitation is unprotected speech to mean that ". . . the First Amendment does not protect a speaker who uses the prohibited language in such a way that he or she 'should know' that the message will mislead or deceive the reader."[20]

REASONS FOR GRANTING THE PETITION

1. The Third and Fourth Circuits Have Overruled Telemarketing Associates-Rule 10(c)

Recently, in the Melville B. Nimmer Memorial Lecture, UCLA Law School Dean Varat said:

> . . . [i]t is essential to emphasize that the First Amendment usually mandates government precision to target at most only the deceptive factual statement that legitimately can ground legal liability. ***Take charitable solicitation, for example. Only actual fraud, not the potential for misleading speech, may be controlled.***[21]

The authority Dean Varat cited for this statement was *Telemarketing Associates.*[22] *Telemarketing Associates*

19. Order of March 13, 2006 by ALJ, page 2, in record below but not in Appendices to this petition.

20. 8a

21. J. D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 U.C.L.A. L. Rev. 1107, 1127 and n. 74 (2006) (emphasis supplied).

22. He also cited the other 3 cases in the *Schaumburg* line.

and the rest of the *Schaumburg* line are the *New York Times v. Sullivan*[23] of charitable solicitation, demarcating a very clear line beyond which government may not punish such speech. Indeed, this Court's opinion in *Telemarketing Associates* recognizes the relationship to *New York Times v. Sullivan* by specifically pointing out that both cases draw a line in exacting proof requirements that "provide sufficient breathing room for protected speech."[24]

In both this case and *United Seniors*, the Courts of Appeals have overruled *Telemarketing Associates* and the *Schaumburg* line. In this case, the Third Circuit did so by holding that a countervailing government interest allows punishment of charitable solicitation for less than actual fraud, the precise position that *Schaumberg* had, in fact, rejected. See 444 U.S. at 639 ("Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient . . . the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech or press.").[25] The Third Circuit also

23. 376 U.S. 254 (1964).

24. 538 U.S. at 620.

25. See also, *Riley, supra*, 487 U.S. at 795.

> In striking down this portion of the Act, we do not suggest that States must sit idly by and allow their citizens to be defrauded. North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it. Further, North Carolina may constitutionally require fundraisers to disclose certain financial information

(Cont'd)

read *Telemarketing Associates* to sustain a "should know" (i.e., negligence) standard,[26] even though this Court's opinion drew a clear line at actual fraud.[27] *United Seniors* also sanctions a negligence standard.[28]

NTU believes that this Court should grant the writ to prevent the lower courts from misreading this Court's definitive decisions in the important area of charitable solicitations and the First Amendment simply to reach an improper result of overruling these decisions. Although this Court does not take cases just to reverse error, a seriously wrong decision on a core subject of constitutional law is generally treated as sufficient to warrant a grant of certiorari. See W. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 Mercer L. Rev. 1015, 1027 (1984); S Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 619 (1984).

(Cont'd)

> to the State, as it has since 1981.***If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency.

(citation omitted at ellipses).

26. 8a.

27. 538 U.S. at 620.

28. 423 F. 3d at 407.

2. Importance

In the First Amendment area, it has often been this Court's practice to grant certiorari *solely* because of the importance of the question presented. See, e.g., *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 5 (2004) ("In light of the obvious importance of that decision, we granted certiorari to review the First Amendment issue . . ."). See also, *City of San Diego v. Roe*, 543 U.S. 77 (2004) (certiorari granted solely because of First Amendment question). Moreover, this Court has also granted certiorari, regardless of the nature of the decision below, to assure that the lower courts do not erode important First Amendment protections. For example, after the decision in *New York Times v. Sullivan*, *supra*, this Court granted certiorari in several cases solely because the lower courts had stingily misread the decision to narrow First Amendment protections. See, e.g., *Ocala Star Banner Co. v. Damron*, 401 U.S. 295 (1971); *Monitor Patriot Co. v. Roy*, 401 U. S. 265 (1971); *St.Amant v. Thompson*, 390 U.S. 727 (1968). Former Chief Justice Rehnquist has noted that the perception that "the lower-court decision may well be***of general importance beyond its effect on these particular litigants" is an important factor in granting certiorari. See W. Rehnquist, *The Supreme Court* 234 (2001). NTU believes this case has importance to all charitable organizations, particularly citizen's advocacy groups. The former Chief Justice has also noted that the "perception that the decision is wrong in light of Supreme Court precedent," *id.* at 235, combines with importance to be the major factor supporting a certiorari grant.

3. No Circuit Conflict-Rule 10(a).

While this Court often looks for a Circuit conflict as a reason for granting the writ, this is part of the larger concept that this Court should let the law proceed until a trend develops before jumping in to make constitutional law or reaching out to declare a statute unconstitutional. However, two circuits have now emphatically taken a narrow view of the First Amendment in the face of the same very broad agency interpretation of §1140 that directly impinges on protected speech. This is an important trend. This trend makes it unlikely that others will have the courage to further raise constitutional challenges to §1140, in light of its draconian monetary penalty threats.[29] Faced with a SSA demand, a charitable solicitor would be foolhardy, in light of the trend of the Third and Fourth Circuits and §1140's massive fine authorization, to gamble that, after exhausting an administrative process, the charitable solicitor will be lucky enough to find a Circuit to buck the trend. Certainly, the advice of most counsel would be to settle or withdraw.

"Chill and uncertainty," *Riley*, *supra*, 487 U.S. at 794, were major factors identified by this Court as motivating its actions in this area of the law. Because of the chill of the Third and Fourth Circuit decisions, it is now unrealistic to believe that a Circuit conflict will develop in normal course, and there is no longer any

---

29. §1140 authorizes a penalty of ***$5000 per piece mailed***. See 42 U.S.C. §1320b-10(b) (emphasis supplied). In the present case, which involved a very modest test direct mail solicitation of about 500,000 pieces, NTU was exposed to the risk of a $2,745,820,000 fine.

justification to wait for one before addressing the issue that these two Circuits have so mishandled. This is particularly true, because §1140, in authorizing massive penalties for speech, gives SSA a potent tool with which to attack its critics. Long-standing, donation-funded citizen's advocacy groups like NTU serve an important function in our democracy, and the Third and Fourth Circuit's decisions place their very existence at risk.

4. Not Precedential

While it is not always the announced practice in this Court to take cases that make no precedent, the Court has regularly done so where the issue is important and the decision below is likely wrong in light of precedent. See, e.g., *Kane v. Garcia Espitia*, 546 U.S. 9 (2005); *Dye v.Hofbauer*, 546 U.S. 1 (2005): *Illinois v. Fisher*, 540 U.S. 544 (2004); *United States v. Flores-Montano*, 541 U. S. 149 (2004). The Third Circuit panel's decision to mark its opinion not precedential can have no other purpose than to avoid review here. See J. Cole and E. Bucklo, *A Life Well Lived: An Interview with Justice John Paul Stevens*, 32 Litigation 8, 67 (2006), where the authors quote Justice Stevens as saying he tends to vote to grant more on unpublished opinions "on the theory that occasionally judges will use the unpublished opinion to reach a decision that might be a little hard to justify."

Certainly, the marking of the Third Circuit's decision as "not precedential" is an abuse of any criteria for unpublished opinions, since the issue of whether §1140 violated the First Amendment as applied to charitable solicitation had never been addressed in the Third Circuit and had been considered only once elsewhere, in *United Seniors*.[30] Moreover, the decision to read *Schaumburg* to hold the opposite of its declared meaning that the fraud requirement cannot be bent by a countervailing governmental interest cannot be characterized as a simple fact-based decision of no general importance. Indeed, when this point is combined with the certainty that the Third Circuit's opinion, whatever its marking, will be found by anybody Shepardizing either §1140 or *United Seniors*, and then read and followed, preventing the damaging fiction that it is not a precedent is itself sufficient reason to grant certiorari.

---

30. According to the Third Circuit's own rules, a decision will be marked non precedential if it "appears to have value only to the trial court or the parties." Third Circuit Internal Operating Procedures, §5.3.

CONCLUSION

The Court is requested to grant the writ of certiorari.

Respectfully submitted,

MICHAEL E. GELTNER
Counsel of Record
GELTNER AND ASSOCIATES, PC
105 North Virginia Avenue
Suite 305
Falls Church, VA 22046
(703) 536-2334

JAMES E. MCCOLLUM, JR.
MCCOLLUM AND ASSOCIATES, LLC
7309 Baltimore Avenue
Suite 117
College Park, MD 20741
(301) 864-6070

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED DECEMBER 11, 2008

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-3381

NATIONAL TAXPAYERS UNION,

Petitioner

v.

UNITED STATES SOCIAL SECURITY ADMINISTRATION; OFFICE OF THE INSPECTOR GENERAL,

Respondent.

Petition for Review of Final Decision of
Commission of Social Security Administration
(HHS-1:07-43)

Argued November 20, 2008

Before: FUENTES, HARDIMAN, and GARTH,
Circuit Judges
Filed December 11, 2008

Appendix A

OPINION OF THE COURT

FUENTES, *Circuit Judge*:

The National Taxpayers Union ("NTU") petitions for review of a decision of the Department of Health and Human Services Departmental Appeals Board that upheld a determination by an administrative law judge ("ALJ") who found that NTU mailed correspondence that used "social security" in a manner that violated Section 1140 of the Social Security Act, 42 U.S.C. § 1320b-10. The Appeals Board also affirmed the ALJ's imposition of a civil penalty of $274,582 against NTU. Because we find that Section 1140(a)(1) is neither unconstitutional as-applied, nor unconstitutionally overbroad, and that the ALJ's decision is supported by substantial evidence, we deny the petition for review.[1]

I. Facts

NTU is a not-for-profit taxpayer advocacy organization. In 2001, NTU sent thousands of direct mail pieces to consumers to solicit donations. The brochures included language in large, red, bold type that stated, "Official National Survey on Social Security." The brochures also included the statement that it was "commissioned by the NTU for the Social Security Administration, White House, and Congress of the United States." The Social Security Administration ("SSA") received a complaint, and the Inspector General

1. We have jurisdiction pursuant to 42 U.S.C. § 1320a-7a(e).

of the SSA determined that the mailing violated Section 1140 of the Social Security Act. Section 1140 prohibits the use of nineteen phrases, including "social security," in a manner that either (1) the writer knows or should know, or (2) the reader could reasonably perceive as conveying the false impression of official endorsement of the material by the SSA or the government. The Inspector General sent a cease-and-desist letter to NTU, and NTU responded with an apology. SSA subsequently received an additional complaint, and determined that the basis of the new complaint was a slightly altered version of the same brochure which NTU mailed after the cease-and-desist letter. The SSA Inspector General sent another letter to NTU, demanding that NTU provide written confirmation of its intent to comply with Section 1140 within ten days. Instead of complying, NTU filed a lawsuit in United States District Court, claiming that Section 1140 was unconstitutional.[2] While the action was pending, NTU mailed a third version of the brochure, which SSA also considered misleading and in violation of Section 1140.

The SSA Inspector General wrote NTU, stating that it planned to impose a penalty in the amount of $274,582, or $.50 per offending direct mail piece[3] NTU requested a hearing in front of an ALJ, who found that NTU

2. The District Court ultimately dismissed NTU's complaint, and the Fourth Circuit affirmed.

3. The statute provides for a "civil money penalty not to exceed . . . $5,000" for each piece of mail that contains the prohibited language. 42 U.S.C. § 1320b-10(b)(1).

violated both prongs of Section 1140. Specifically, the ALJ found that NTU knew that the language used in the brochures would induce recipients to read it because the language conveyed the false impression that the SSA authorized the mailing. Similarly, the ALJ found that recipients could reasonably interpret the language on the brochure as conveying the false impression that the SSA authorized the mailing. Finally, the ALJ found that the proposed penalty was reasonable. NTU appealed the ALJ's decision to the Appeals Board of the Department of Health and Human Services, which refused to review the decision, thereby adopting the ALJ's decision as final. NTU petitions this Court for review of the agency's final decision.

In its petition for review, NTU asserts several arguments. First, NTU challenges the constitutionality of Section 1140, arguing that it violates NTU's First Amendment rights as-applied, and that it is facially overbroad. Second, NTU argues that the monetary penalty imposed is "criminal in nature" and that it is "excessive" and prohibited by the Eighth Amendment. Finally, NTU urges this Court to apply *Daubert* principles to administrative proceedings and to strike the expert testimony from the ALJ proceeding.

II. Discussion

A. First Amendment[4]

1. *As-Applied Challenge*

NTU first argues that Section 1140 violates the First Amendment as-applied because such application penalizes the organization's speech without finding "actual intent to defraud." In other words, according to NTU, government may not limit speech unless that speech intends to defraud or deceive the reader or listener. This assertion requires little analysis, because it is based on an incorrect reading of *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). Contrary to NTU's assertions, *Village of Schaumburg* acknowledged that a "direct and substantial limitation on protected activity" is constitutional if "it serves a sufficiently strong, subordinating interest." *Id.* at 636. Here, the government has a substantial interest in protecting Social Security recipients from deceptive mailings. For millions of Americans, Social Security is a vital, if not their only, source of income. Mail that appears to be from the SSA piques beneficiaries' interest and induces them to read and respond accordingly. Congress enacted Section 1140 to protect seniors and other beneficiaries from fraud, and to ensure that when the SSA sends legitimate mail to beneficiaries, the recipients will open it and not

4. We review NTU's constitutional claims de novo. *See, e.g., CBS Corp. v. FCC*, 535 F.3d 167, 174 (3d Cir.2008).

perceive it as "junk mail." House Comm. on Ways and Means, 102D Cong., Report on Deceptive Solicitations 5 (Comm. Print 1992). Section 1140 requires only that charities refrain from using deceptive language when soliciting. Therefore, Section 1140 is constitutional as-applied because it serves a "strong, subordinating interest."

2. *Facially Overbroad*

Section 1140 regulates two types of conduct. The first type of conduct relates to the intentions of the speaker. This prong states that a speaker cannot use nineteen phrases, including "social security," "in a manner which such person knows or should know would convey . . . the false impression that such item is approved, endorsed or authorized by" SSA. 42 U.S.C. § 1320b-10(a). The second type of conduct is objective with regard to the reader, and prohibits the use of the proscribed phrases "in a manner which reasonably could be interpreted or construed as conveying the false impression that such item is approved, endorsed or authorized" by SSA. *Id.* Both prongs also cover communications that convey the false impression that the author has "some connection with the SSA." *Id.*

This Court has held that it will strike down a regulation of speech on its face "if its prohibitions are sufficiently overbroad-that is, if it reaches too much expression that is protected by the Constitution." *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir.2008). In other words, this Court must find that the very

existence of the regulation at issue "will inhibit free expression to a *substantial* extent." *Id.* (quotation marks omitted) (emphasis added); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246-44, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (invalidating the Child Pornography Prevention Act as facially overbroad because the statute reached a "substantial" amount of protected speech, such as speech that neither appealed to the prurient interest nor was patently offensive, including speech that had serious "literary, artistic, political, and scientific value"); *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) ("[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."); 181 *South Inc. v. Fischer*, 454 F.3d 228, 235 (3d Cir.2006) ("The overbreadth claimant bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists.").

In *United States v. Williams*, __ U.S. __, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008), the Supreme Court implied that it disfavors facial challenges, preferring to review circumstances under which the challenged statute actually infringes protected speech. The Court noted that the overbreadth doctrine tends "to summon forth an endless stream of fanciful hypotheticals" that may potentially implicate the infringement of protected speech. *Id.* at 1843. The Court further stated that the " 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.' " *Id.* at 1844

(quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). The Court described hypothetical scenarios discussed at oral argument, and noted that if those situations came to pass, the affected parties could bring an as-applied challenge. *Id.; see also Washington State Grange v. Washington State Republican Party*, __U.S. __, __, 128 S.Ct. 1184, 1191, 170 L.Ed.2d 151 ("Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. . . . Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should not . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.").

As previously discussed, the first prong of Section 1140 prohibits the use of words such as "social security" in a manner that the speaker "*knows* or *should know* would convey" the false impression of government approval or endorsement. Like other forms of public deception, fraudulent charitable solicitation is unprotected speech. *Illinois v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 611-12, 123 S.Ct. 1829, 155 L.Ed.2d 793 (2003). Therefore, the prong of Section 1140 that contains the "knowing" standard is not unconstitutionally overbroad. Likewise, the First Amendment does not protect a speaker who uses the prohibited language in such a way that he or she "should know" that the message will mislead or deceive the reader.

The second part of Section 1140 requires closer analysis because it does not require that the speaker "know" or "should know" that the language could mislead the reader. Rather, the second prong of the statute prohibits the use of the language in such a way that the reader could reasonably interpret as conveying governmental endorsement. Because this prong does not have a scienter requirement for the speaker, it could possibly reach some protected speech. However, it is wholly unclear that such non-deceptive speech reaches a "substantial" amount of protected speech. NTU has failed to provide any significant examples of protected speech falling under the statute and its counsel essentially disavowed the overbreadth claim at oral argument. Given the lack of evidence of the second prong's "substantial" burden on protected speech, we find that the objective prong of Section 1140 is not overbroad.

We note that the Fourth Circuit has also examined a similar facial challenge to Section 1140 in *United Seniors Ass'n, Inc. v. Soc. Sec. Admin.*, 423 F.3d 397, 406-07 (4th Cir.2005). As in this case, the Fourth Circuit held that, while the objective prong of Section 1140 could reach some protected speech, any such speech constituted, "at most, a minuscule portion of the speech reached by the statute." *Id.* at 407.

For these reasons, we reject NTU's facial challenge.

B. Monetary Fine[5]

NTU next challenges the penalty imposed by the ALJ, arguing that it is criminal in nature and "excessive" in violation of the Eighth Amendment.

In *Myrie v. Comm'r, N.J. Dept. of Corr.*, this Court examined the issue of whether a surcharge at a prison commissary was civil or criminal in nature, and whether the surcharge was excessive. This Court explained that the first step in such an inquiry is to determine whether the legislature, " 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.' " 267 F.3d 251, 256 (3d Cir.2001) (quoting *Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997)). This inquiry is clear, because Section 1040 expressly permits a " *civil* money penalty" for violation of the statute. 42 U.S.C. § 1320b-10(b) (emphasis added).

Under *Myrie*, the Court next examines whether the "statutory scheme [i]s so punitive either in purpose or effect . . . as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.' " *Myrie*, 267 F.3d at 256 (quoting *Hudson*, 522 U.S. at 99-100) (internal citations omitted). This inquiry requires the Court to apply the seven criteria identified in *Kennedy*

---

5. An appellate court reviews the question of whether a fine is constitutionally excessive under a de novo standard. *United States v. Bajakajian*, 524 U.S. 321, 337 n. 10, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998).

v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). These criteria include

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . .

Id.

Applying these criteria to NTU's penalty of $.50 per unit that violated Section 1140, we conclude that the criteria do not support NTU's contention that the penalty is criminal in nature. First, NTU concedes that the penalty does not involve an "affirmative disability or restraint." (App. Br. at 32.) Second, the Supreme Court has stated that monetary penalties have not "historically been viewed as punishment." *Hudson*, 522 U.S. at 104. Next, as discussed in Section II.A.2., *supra*, a violation of Section 1140 does not necessarily require a finding of scienter. Although Section 1140's monetary penalty likely promotes the traditional ends of punishment, retribution and deterrence, to some degree, that alone is not enough to characterize the

penalty as penal in nature, rather than civil. *See id.* at 105 ("[T]he mere presence of [deterrence] is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals.") (internal citation and quotation marks omitted). In fact, one of the alternative purposes of the sanction is to reimburse the Social Security Trust Fund for the cost of policing deceptive practices. STAFF OF H.R. COMM. ON WAYS AND MEANS, 102D CONG., REPORT ON DECEPTIVE SOLICITATIONS, at 7 (Comm. Print 1992). In addition, Section 1140 is not consistent with criminal behavior, because a civil penalty reaches negligent conduct, whereas actual fraud is required for a crime. With regard to "whether an alternative purpose to which it may rationally be connected is assignable for it," this Court has interpreted this inquiry to ask "whether an asserted 'sanction' may be reasonably regarded as having a purpose other than punishment." *Myrie*, 267 F.3d at 261. As previously noted, the legislative history demonstrates that aside from punishment, there are the additional goals of deterrence, as well as funding the cost of enforcement of Section 1140. Staff of H.R. Comm. on Ways And Means, 102d Cong., Report on Deceptive Solicitations, at 9 (Comm. Print 1992). Finally, the fine at issue is not "excessive in relation to the alternative purpose assigned." When compared to the cost to the government to enforce Section 1140, the $.50 per unit fine is not excessive. Moreover, it is far less than the maximum fine of $5,000 per violation that the statute permits.

Likewise, we find NTU's contention that the fine violates the Excessive Fines Clause of the Eighth Amendment meritless. To violate the Excessive Fines Clause, the fine must be both "excessive" and a "fine." *Tillman v. Lebanon County Corr. Facility*, 221 F.3d 410, 420 (3d Cir.2000). For the reasons noted above, the penalty at issue is neither "excessive" nor a "fine," which more commonly refers to a penalty for a criminal offense. *Id.* (citing *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989)).

C. Expert Testimony[6]

NTU asks this Court to endorse the application of *Daubert* to administrative proceedings and to strike the testimony of Professor William Arnold, the expert who testified for the government before the ALJ. *Daubert* sets forth rules for determining whether expert witnesses who testify in federal trials are reliable and relevant as required by the Federal Rules of Evidence. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Here, NTU argues that Professor Arnold's testimony was "sloppy and unscientific" and should have been excluded from the administrative hearing under *Daubert*. However, neither the Federal Rules of Evidence nor *Daubert* apply to administrative hearings. *See, e.g.*,

6. This Court will defer to fact determinations by the agency "if supported by substantial evidence on the record considered as a whole." 42 U.S.C. § 1320a-7a(e) (incorporated by reference in 42 U.S.C. § 1320b-10(c)(1)).

20 C.F .R. § 498.217(b) ("[T]he ALJ will not be bound by the Federal Rules of Evidence, but *may* be guided by them in ruling on the admissibility of evidence." (emphasis added)); *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 n. 4 (9th Cir.2005) (explaining that *Daubert* does not govern the admissibility of evidence before an ALJ). *But see Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir.2004) (applying the "spirit of *Daubert*" to administrative proceedings).

We find NTU's arguments without merit. Not only did the ALJ explain the Professor's extensive credentials in her opinion, but she conceded that she did not rely on his testimony in reaching her decision. Specifically, the ALJ noted that "much of Professor Arnold's testimony simply states the obvious. Interpreting the plain meaning of the language on such blatantly deceptive mailers does not require great expertise." (App. at 17 n. 9.) Even without considering the testimony of Professor Arnold, we find that there is substantial evidence in the record to support the ALJ's determination.

For the foregoing reasons, we will deny NTU's petition.

APPENDIX B — RECOMMENDED DECISION OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEPARTMENTAL APPEALS BOARD, APPELLATE DIVISION DATED APRIL 17, 2007

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:

Social Security Administration
Office of the Inspector General,

Petitioner,

- v. -

National Taxpayers Union,

Respondent.

RECOMMENDED DECISION DECLINING REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

The National Taxpayers Union (NTU) appealed a December 14, 2006 decision by Administrative Law Judge (ALJ) Carolyn Cozad Hughes, *Social Security Administration v. National Taxpayers Union*, DAB CR1543 (2006). In that decision, the ALJ: (1) found that NTU had mailed correspondence that used the words "social security" in a manner that violated section 1140 of the Social Security Act (Act); and (2) affirmed the

$274,584 civil money penalty proposed by the Social Security Administration's Office of Inspector General for NTU's violations of section 1140.

The regulations governing appeals to the Board in administrative proceedings to enforce section 1140 provide that the Board "will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained an error of law." 20 C.F.R. § 498.221(i). The Board may remand a case to the ALJ for further proceedings or may issue to the Commissioner of Social Security a recommended decision to decline review or affirm, increase, reduce, or reverse the penalty determined by the ALJ. 20 C.F.R. § 498.221(h).

The Board has considered each of the contentions made by NTU in the brief accompanying its January 11, 2007 notice of appeal and examined the record. Applying the appropriate standard of review, the Board finds no basis to disturb the ALJ's factual findings or legal conclusions on any issue. Consequently, the Board issues this recommended decision to decline review of the ALJ's December 14, 2006 decision.

This recommended decision becomes the final decision of the Commissioner 60 days after the date on which it is served on the parties and the Commissioner, *unless* the Commissioner reverses or modifies the recommended decision within that 60-day period. 20 C.F.R. § 498.222(a). If the Commissioner does not reverse or modify the recommended decision, the Board

will serve a copy of the Commissioner's final decision on the parties. If the Commissioner reverses or modifies the recommended decision, the Commissioner shall serve NTU with a copy of his final decision.

Appeal Rights

NTU may appeal the final decision of the Commissioner by filing a petition for judicial review in the appropriate United States Court of Appeals. *See* Act §§ 1140(c)(1), 1128A(e). The petition for judicial review must be filed within 60 days after NTU is served with a copy of the Commissioner's final decision. 20 C.F.R. § 498.222(c)(1). If a petition for judicial review is filed, a copy of the filed petition must be sent by certified mail, return receipt requested, to the Social Security Administration's General Counsel at the following address:

Social Security Administration Office
of General Counsel
Altmeyer Building
6401 Security Boulevard, Room 635
Baltimore, MD 21235.

See 20 C.F.R. § 498.222(c)(2).

s/ Judith A. Ballard
Judith A. Ballard

s/ Leslie A. Sussan
Leslie A. Sussan

s/ Donald F. Garrett
Donald F. Garrett
Presiding Board Member

APPENDIX C — DECISION OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEPARTMENTAL APPEALS BOARD, CIVIL REMEDIES DIVISION DATED DECEMBER 14, 2006

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:

Social Security Administration,

Petitioner,

- v. -

National Taxpayers Union,

Respondent.

DECISION

The Respondent, National Taxpayers Union (NTU), is an advocacy group with headquarters in Alexandria, Virginia. In order to increase membership and raise money, NTU regularly sends out solicitations and other mailers. Here, because it persisted in sending mailers asserting (among other claims deemed misleading): "*OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY*," the Inspector General (I.G.) of the Social Security Administration (SSA) proposes imposing against it a $274,582 civil money penalty (CMP) under section 1140 of the Social Security Act (Act). For the reasons set forth below, I agree with SSA and impose against NTU a CMP of $274,582.

Appendix C

I. Background

In February 2002, a United States Senator forwarded to SSA a constituent complaint about a letter and survey that NTU sent him.[1] P. Ex. 3. The matter was referred to the I.G. who, in a letter dated April 3, 2002, advised NTU of the complaint and of the I.G.'s determination that the mailing violated section 1140 of the Act because its language could reasonably be construed as conveying the impression that NTU was conducting a survey authorized by SSA. In fact, SSA had not endorsed, approved, or authorized NTU to conduct such a survey on its behalf. The I.G.'s letter asked that, in all its direct mailings and other communications, NTU immediately cease and desist from using the words "Social Security" or "Social Security Administration" in a manner that could reasonably be construed as conveying the false impression that the communication was authorized, approved, or endorsed by SSA. P. Ex. 5.

NTU's president, John Berthoud, responded in a letter dated April 12, 2002, apologizing for any unintended appearance of impropriety. The letter explained that NTU intended to use the survey results "in lobbying the government, Congress, and the Social Security Administration for much-needed changes (which was our purpose for commissioning it)," and promised to change the package design "so that there is no impression that

---

1. We refer to this mailing as "Version 1." An original example of Version 1 is in the record as R. Ex. 1. *See also* P. Ex. 17.

the SSA has provided any formal authorization for our project."[2] P. Ex. 6; Stipulation; Tr. 2-3.

On September 4, 2002, however, SSA received another complaint about an NTU mailing similar to the one that generated the first complaint. P. Exs. 9, 11. After verifying that this new version of NTU's mailing was developed and mailed after NTU promised to change its package design (P. Ex. 10), the I.G. determined that the revised mailing also misled the public into believing that the survey was authorized, endorsed, or approved by SSA.[3] In a letter dated November 7, 2002, the I.G. demanded that, within 10 days of its receipt of the letter, NTU provide written confirmation of its plan to comply

2. President Berthoud's statement could be construed as misleading. NTU neither solicited the survey nor used its results for any purpose. NTU's Membership Director, Douglas Frank, hired a copywriter, D. Richard Geske, to design a mailing for the purpose of increasing membership and raising money. The copywriter decided that the survey would be an effective response device or "involvement technique." Tr. 11; 252. The survey itself was not a valid survey, by any objective standard. Tr. 131-32. The survey "results" have never been used. They were not tabulated until March 2003, and were not shared with the NTU Board. Tr. 10, 17, 43, 48 ("Actually, no particular plan of operation for [tabulating survey results]."). When tabulated, the results were not particularly supportive of NTU's position—a fact NTU seems to have ignored. R. Ex. 10. NTU's then Director of Government Affairs, Alfred W. Cors, Jr., was not even aware of the survey, and opined that it was designed more to raise money for NTU than to lobby Congress. Tr. 109-11.

3. This revised mailing is referred to as Version 2, and an original example is in the record as R. Ex. 2. *See also* P. Ex. 18.

with section 1140. The letter warned that, if NTU failed to act, the I.G. would take administrative action under section 1140 and its implementing regulations. P. Ex. 11.

NTU declined to submit the requested plan. Instead, characterizing section 1140 as unconstitutional, on December 6, 2002, NTU filed a law suit against SSA in U.S. District Court for the District of Maryland. P. Ex. 12; *see* SSA's post-hearing brief (SSA Br.), Appendix A. In January and February 2003, while the court action was pending, NTU mailed out a third version of its solicitation/survey, which SSA also considers misleading and violative of section 1140. P. Exs. 14, 16, 19.[4]

The District Court subsequently dismissed NTU's complaint. *National Taxpayers Union v. SSA*, Civil Action No. WMN-02-3949 (September 3, 2003) (SSA Br., Appendix A). NTU appealed, and, in a decision dated July 15, 2004, the U.S. Court of Appeals for the Fourth Circuit affirmed the dismissal. *National Taxpayers Union v. SSA*, 376 F.3d 239 (4th Cir. 2004), *cert. den.* 125 S.Ct. 1300 (2005).

Shortly thereafter, in a letter dated May 10, 2005, the I.G. proposed imposing against NTU a CMP in the amount of $274,582 (or 50¢ per violation), based on its determination that, between December 2001 and February 2003, NTU mailed 549,164 solicitation surveys

4. Referred to as Version 3, an original example of the mailing is in the record as R. Ex. 3. *See also* P. Ex. 19.

that violated section 1140. The letter advised NTU of its appeal rights and NTU timely requested a hearing.

I held a hearing in Washington, D.C. on July 12 and 13, 2006. I have admitted into evidence SSA Exhibits (P. Exs.) 1-37, and NTU Exhibits (R. Exs.) 1-19, and 24-51. Tr. 2, 247. Following the hearing, the parties submitted post-hearing briefs (SSA Br. and NTU Br.) and reply briefs (SSA Reply and NTU Reply).

II. Statutory and Regulatory Background

Section 1140 of the Act prohibits misuse of symbols, emblems, or names in reference to Social Security or Medicare.

> (a)(1) No person may use, in connection with any item constituting an advertisement, solicitation, circular, book, pamphlet, or other communication . . . alone or with other words, letters, symbols or emblems—
>
> > (A) the words "Social Security", "Social Security Account", "Social Security System", "Social Security Administration", "Medicare", "Health Care Financing Administration"[5], "Department of Health and Human Services", "Health and Human

5. Citation to the Health Care Financing Administration (HCFA) at section 1140 has been changed to the Centers for Medicare & Medicaid Services (CMS). P.L. 108-173, § 900(e).

> Services", "Supplemental Security Income Program", or "Medicaid", the letters "SSA", "HCFA", "DHHS", "HHS", or "SSI", or any other combination or variation of such words or letters, or
>
> (B) a symbol or emblem of the Social Security Administration, Health Care Financing Administration, or Department of Health and Human Services (including the design of, or a reasonable facsimile of the design of . . . envelopes or other stationery used by the Social Security Administration, Health Care Financing Administration, or Department of Health and Human Services) or any other combination or variation of such symbols or emblems,

in a manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that such item is approved, endorsed, or authorized by the Social Security Administration, the Health Care Financing Administration, or the Department of Health and Human Services or that such person has some connection with, or authorization from, the Social Security Administration, the Health Care Financing Administration, or the Department of Health and Human Services.

* * * *

> (3) Any determination of whether the use of one or more words, letters, symbols, or emblems (or any combination or variation thereof) in connection with an item described in paragraph (1) . . . is a violation of this subsection shall be made without regard to any inclusion in such item (or any so reproduced, reprinted, or distributed copy thereof) of a disclaimer of affiliation with the United States Government or any particular agency or instrumentality thereof.

The Act provides for CMPs of up to $5,000 *per violation.* Act, § 1140(b). Each piece of mail containing "one or more words, letters, symbols, or emblems in violation of subsection (a)" constitutes a separate violation.

Implementing regulations are found at 20 C.F.R. Part 498. Echoing the broad statutory language, they authorize the I.G. to impose a penalty against any person who, he determines,

> has made use of certain Social Security program words, letters, symbols, or emblems in such a manner that they knew or should have known would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that an advertisement or other item was authorized, approved, or endorsed by the Social Security Administration, or that such person has some connection with, or

> authorization from, the Social Security Administration.

20 C.F.R. § 498.102(b). CMPs maybe imposed for misuse of the statutorily protected words, letters, symbols, or emblems, "or any other combination or variation" of those words, letters, symbols or emblems. 20 C.F.R. § 498.102(b)(1). Again, the use of a disclaimer is not considered a defense in determining a section 1140 violation. 20 C.F.R. § 498.102(c).

With respect to the amount of the penalty, the regulations authorize the I.G. to impose a penalty of not more than $5,000 for each violation. In the case of a direct mailing solicitation, each separate piece of mail containing one or more program words, letters, symbols, or emblems constitutes a separate violation. 20 C.F.R. § 498.103. In determining the amount of the CMP, the I.G. takes into account: (1) the nature and objective of the advertisement, solicitation, or other communication, and the circumstances under which they were presented; (2) the frequency and scope of the violation and whether a specific segment of the population was targeted; (3) the prior history of the individual, organization, or entity in their willingness or refusal to comply with informal requests to correct violations; (4) the history of prior offenses of the individual, organization, or entity in their misuse of program words, letters, symbols, and emblems; (5) the financial condition of the individual or entity; and (6) such other matters as justice may require. The use of a disclaimer of affiliation with the U.S. government, SSA, or its programs is not a mitigating factor in determining the amount of penalty. 20 C.F.R. § 498.106.

If the I.G. seeks to impose a penalty, it serves the party with written notice of its intent. 20 C.F.R. § 498.109. The party is entitled to a hearing before an administrative law judge (ALJ). 20 C.F.R. § 498.202. The hearing is not limited to specific items and information set forth in the notice letter; additional items or information may be introduced by either party, subject to the 15-day exchange requirements of 20 C.F.R. § 498.208. 20 C.F.R. § 498.215(e).

NTU has the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances. The I.G. has the burden of going forward and the burden of persuasion with respect to all other issues. The burden of persuasion "will be judged by a preponderance of the evidence." 20 C.F.R. § 498.215(b) and (c).

The regulations require me to issue an initial decision based on the record, and specifically grants me the authority to affirm, deny, increase, or reduce the penalties proposed by the I.G. 20 C.F.R. § 498.220.

III. Issues

I must determine whether the three solicitations sent by NTU violate section 1140 of the Act. Specifically, (1) Did NTU know, or should it have known, that its solicitations conveyed the false impression that its mailings were approved, endorsed, or authorized by SSA or that NTU had some connection with or authorization from the agency?

In the alternative, (2) Could the solicitations reasonably be interpreted or construed as conveying the false impression that they were approved, endorsed, or authorized by SSA or that NTU had some connection with or authorization from the agency? If I find in the affirmative on either of these questions, NTU has violated the statute and is subject to the imposition of a CMP.

(3) If I conclude that NTU has violated section 1140, what, if any, CMP should be imposed?

IV. Discussion

NTU relies on direct mail solicitations "to help" build and maintain grass roots support." R. Ex. 9, at 5. According to NTU's then Membership Director, Douglas Frank, in June 2001, NTU decided to use the issue of private investment accounts for Social Security in its effort to increase membership and raise funds. R. Ex. 17, at 1 (Frank Decl. ¶¶ 1, 2), Tr. 6. He directed D. Richard Geske, an independent copywriter, to put together a solicitation package that addressed the issue. He gave no specific directions, leaving the choice of "response device" up to the copywriter. R. Ex. 17, at 1 (Frank Decl. ¶ 3); Tr. 7. He did not ask Copywriter Geske to design a survey. Tr. 7-8, 11; R. Ex. 15, at 1-2 (Geske Decl. ¶ 13). On his own initiative, Copywriter Geske decided to include a survey in the package. R. Ex. 15, at 3 (Geske Decl. ¶ 16).

All of the mailers are "self-mailers;" the entire package is one piece of paper that "comes open in the reader's hands, but the parts stay together until used." R. Ex. 15, at 2 (Geske Decl. ¶ 4); R. Ex. 17, at 1-2 (Frank Decl. ¶ 3).

A. In all three versions of its "Social Security" solicitation, NTU violated section 1140 of the Act.[6]

1. NTU used the words "Social Security" on its solicitations in a manner that could reasonably be interpreted as conveying the false impression that its mailings were approved, endorsed, or authorized by the Social Security Administration, or that NTU had some connection with or authorization from SSA.

NTU argues that a "reasonable person" could see that its mailers originated from NTU, and not from SSA or any other government agency. But this is not the statutory standard. The baseline inquiry under section 1140(a)(1) is whether NTU's mailers reasonably could be interpreted or construed to have conveyed the false impression that SSA *approved*, *endorsed*, or *authorized* their contents. Further, the statute does not require any evidence of actual confusion by those who received the mailers. As the Court of Appeals for the Fourth Circuit

---

6. I make findings of fact and conclusions of law to support my decision in this case. I set forth each finding below, in italics and bold, as a separate lettered or numbered heading.

has acknowledged, this test creates a "relatively low threshold to support a finding of liability." *United Seniors Association v. SSA*, 423 F.3d 397, 405 (4th Cir. 2005).

Here, although NTU's mailers do not purport to be *from SSA* itself, they are simply chock-full of language that conveys the impression that SSA *approved*, *authorized*, or *endorsed* their contents. I consider below some of the more egregious examples:

Version 1.

- Written on the outside of the Version 1 mailer, in underlined bright red capital letters, is the following: *OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY.*[7] Immediately beneath that, in smaller capital letters, the following appears:

  COMMISSIONED BY THE NATIONAL TAXPAYERS UNION FOR **THE SOCIAL SECURITY ADMINISTRATION, WHITE HOUSE AND CONGRESS OF THE UNITED STATES**

---

7. In *United Seniors*, the Court observed that mass mailers purposely use bold red ink for the "Social Security message" and black ink for the sender block "to detract attention from the sender block and focus attention on the Social Security message." *United Seniors Association*, 423 F.3d 401. Copywriter Geske conceded that he wanted "to bring attention to this particular piece."

(Emphasis in original).[8] P. Ex. 17, at 1; R. Ex. 1. I find this language, by itself, sufficient to establish a section 1140 violation since it creates the impression that NTU's survey has official sanction. Even though it shows that NTU sent the mailer, the recipient would still reasonably think that SSA approved, endorsed, or authorized its contents. *See United Seniors Association*, 423 F.3d at 405. The reader is led to believe that NTU is acting with "official" sanction from three governmental entities. *See also* P. Ex. 37, at 2 (Arnold Decl.); Tr. 147-48.

In enacting section 1140, Congress was particularly concerned that direct mailers put "Social Security" words and symbols on the face of their mailers to entice recipients into opening them. As the Court of Appeals noted, once a recipient of a misleading envelope opens the envelope and begins reading its contents, the deceptive "communication" has served its purpose. *United Seniors Association*, 423 F.3d at 404. NTU has made much of what I consider an inconsequential distinction between the outside of a self-mailer and an envelope. For all practical purposes, the information printed on the outside of these self-mailers has the same impact as information printed on the outside of an envelope, and, as with an envelope, once the recipient opens the self-mailer, the deceptive communication has achieved its purpose.

---

8. To the extent possible, quotations from the mailers are presented in their original format, including capitalization, italics, underlining, and bold text.

Appendix C

- The outside of the mailer is filled with additional language designed to create the impression of some official sanction:

> POSTMASTER: IMMEDIATE DELIVERY REQUESTED DELIVER IN ACCORDANCE WITH POSTAL REGULATIONS: DMM300.1.0
>
> ***CERTIFIED SURVEY ENCLOSED:***
> *P020041B 03204 16282*
> **PLEASE OPEN *IMMEDIATELY* AND *KINDLY RESPOND* AS SOON AS POSSIBLE**

(Emphasis in original). P. Ex. 17, at 1. Director Frank acknowledged that the mailer was simply sent at the third class, non-profit rate, and that nobody "certified" the survey. Tr. 62. Even Copywriter Ceske eventually conceded that this language is there to "increase the importance of a piece." Tr. 283, 284.

William E. Arnold, Ph.D, is a Professor Emeritus in Communications at Arizona State University, and a Professor of Gerontology at the University of Arizona. He has conducted research on the use of information to change attitudes and behavior. P. Ex. 37, at 16 *et seq.* (Arnold Decl.); Tr. 121-22. He has extensive experience in conducting surveys, and testified credibly during these proceedings. Tr. 130. Professor Arnold points out that, taken together, the language on the outside of the mailer conveys a sense of urgency that a Social Security

beneficiary would be reluctant to ignore. Even non-beneficiaries could reasonably infer that the mailing contains official documents that could affect personal earnings records maintained by SSA. P. Ex. 37, at 3 (Arnold Decl.).[9]

- When the flyer is opened, it leads to a page with the "National Taxpayers Union" letterhead, below which the violative language is repeated, in bold, underlined capital letters:

---

9. NTU attacks Professor Arnold's expertise, pointing out that the professor admitted that he is not an expert on direct mail tactics. NTU Br. at 8; Tr. 146. I see no reason why he would need such expertise in order to opine knowledgeably in this case. Professor Arnold's expertise in communications is undeniable; he has spent forty years researching, publishing and teaching in that field. He understands the significance of language and is fully qualified to comment on how people might reasonably construe particular words and phrases. Moreover, much of his testimony simply states the obvious. Interpreting the plain meaning of the language on such blatantly deceptive mailers does not require great expertise. Even NTU, although denying the section 1140 violation, concedes that its use of language "might abuse the recipient." NTU Br. at 4 n.6.

Appendix C

OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY

CONDUCTED BY
THE NATIONAL TAXPAYERS UNION
108 NORTH ALFRED STREET
ALEXANDRIA, VIRGINIA 22314

AND COMMISSIONED FOR

THE SOCIAL SECURITY ADMINISTRATION
THE WHITE HOUSE
UNITED STATES HOUSE OF REPRESENTATIVES
UNITED STATES SENATE

(Emphasis in original). P. Ex. 17, at 3. The page then addresses the recipient by name (**ISSUED TO**: [name deleted]), followed by what appears to be very specific identifying information (**QUALIFYING ZONE & RATING; CERTIFICATION NUMBER, and RETURN DATE**). But this identifying information is, in fact, of absolutely no consequence except to create the impression of consequence.

Following that language, in underlined, red capital letters is the "*IMPORT INFORMATION*" section. The recipient is again mentioned by name (in fact, the recipient's name is repeated throughout the mailer) and told:

Appendix C

> ***YOUR NAME WAS SPECIFICALLY CHOSEN*** to receive this ***OFFICIAL SURVEY ON SOCIAL SECURITY*** . . .
>
> . . . Because you have a ***VALID SOCIAL SECURITY NUMBER*** and live in one of the ***QUALIFYING ZONES*** from which ***we are required*** to select at least ***ONE*** participant.

(The ellipses are in the original; emphasis is also in the original). Then the mailing tells the recipient (again by name) that the recipient's participation in the survey is ***crucial***.

> And because you or your spouse has paid into the Social Security system and are receiving or expect to receive benefits in the future. . . .

P. Ex. 17, at 3; R. Ex. 1.

In reviewing this language, Professor Arnold observed that "the recipient's logical conclusion is that SSA has shared official information with NTU, information that only SSA would be privy to, in order for NTU to conduct an official survey on SSA's behalf." P. Ex. 37, at 3-5 (Arnold Decl.). I agree. The references to the recipient's social security number and eligibility create the impression that NTU has specific information that it could only have obtained from SSA. As one recipient of

an NTU mailer (and of Social Security)[10] explained to NTU's private investigator,

> Ms. Fischer: Because in there someplace it says something about people collecting, if I remember correctly.
>
> Mr. Roche: Collecting Social Security?
>
> Ms. Fischer: Yes. I didn't know how they would have possibly found that out.
>
> * * *
>
> Ms. Fischer: It seemed to me that they knew that I was collecting — somehow they got my Social Security number, which is supposed to be private. Nobody is supposed to know that.
>
> Mr. Roche: Right.
>
> Ms. Fischer: Otherwise they wouldn't have known my birthday or my — the fact that I was collecting —

Tr. 233-34.

Further, I agree with the I.G. that the assertion that NTU is *required* to select at least one participant from each "qualifying zone" tells the recipient that NTU is not conducting the survey for itself, but is acting at the

---

10. As discussed *infra*, Laura Fischer received Version 2 of the mailer, which contains this same language.

direction of others who have imposed this requirement. Inasmuch as no other entities are mentioned, logic dictates that SSA, the White House, and/or Congress imposed that requirement.

- On page 4 of the mailing, under the bold red caption "*WHAT ARE THE OPTIONS? CAN SOCIAL SECURITY BE SAVED?*", the mailer describes NTU "[a]s the authorized sponsor of this survey and a credible voice in Washington, D.C. that has exclusively represented the interests of the American taxpayer. . . ."

(Emphasis in original); P. Ex. 17, at 6; R. Ex. 1. Director Frank defended this language by asserting that NTU was the "authorized sponsor" because it authorized itself to conduct the survey. Tr. 61. And Copywriter Geske insisted that if the recipient "read the entire package" he/she would "understand very clearly that it was the National Taxpayers Union." Tr. 287. But no one would reasonably infer that NTU required authorization from itself to sponsor a survey. "Authorization" suggests approval by an outside entity with some authority, and, again, according to the mailer, SSA, the White House, and Congress are the authorizing entities.

The mailer then includes the inevitable, and repeated, requests for donations, along with the ersatz survey. P. Ex. 17, at 8, 10; R. Ex. 1 ("[Name deleted] thank you for your valued participation in this important survey on Social Security. Please return your survey today in the envelope provided and won't you please do your part to help the National Taxpayers Union save Social Security by enclosing your donation of $25 or more. . . ."). Tr. 14-16.

Appendix C

Version 2.

Director Frank responded to the I.G.'s cease-and-desist letter by removing from the mailer the most conspicuous references to the "Social Security Administration." Tr. 19-20. The revised mailer still purports to contain an "***OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY***" that was "**COMMISSIONED BY THE NATIONAL TAXPAYERS UNION FOR THE WHITE HOUSE AND CONGRESS OF THE UNITED STATES.**" (Emphasis in original). P. Ex. 18, at 1; R. Ex. 2. The mailer contains the same specific, faux-consequential identifying information. The recipient is addressed by name and advised that her name was "***SPECIFICALLY CHOSEN***" to receive this ***OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY*** because she lives in a "***QUALIFYING ZONE***" from which NTU is "*required*" to select a participant and she is the "**ONLY** individual from a total of 89" in the above "***QUALIFYING ZONE***" whose name matches the other "important demographic and economic data that's central to the purpose of this survey." P. Ex. 18, at 3; R. Ex. 2.[11] It still refers to the recipient's Social Security eligibility, and refers to NTU as the "authorized sponsor" of the survey. P. Ex. 18, at 6; R. Ex. 2.

I do not find that eliminating "Social Security Administration" from the listed "survey sponsors"

---

11. Copywriter Geske would not admit that this "one of 89" number was a fabrication, but he could not explain why the remaining 88 names would not have qualified, nor why recipients from various zones were all "one of 89." Tr. 270-77.

brought the mailer into compliance with section 1140. The mailer continued to use the term "Social Security" as "part of an overall design" that conveys the impression that the mailer contains an important Social Security document (the survey) sent on behalf of official government sources. This violates section 1140. *See United Seniors Association*, 423 F.3d 405.

Laura Fischer is a retiree receiving Social Security benefits. P. Ex. 34, at 1 (Fischer Decl. ¶ 1). She has had no association with NTU, but a copy of Version 2 was mailed to her in about June 2002. *Id.* at 2 (Fischer Decl. ¶¶ 4, 5). She testified, credibly, that she does not generally open such solicitations, but she opened this one because of the bold red reference to Social Security and because it indicated that a "certified survey" was enclosed. *Id.* at 2 (Fischer Decl. IT 4). Tr. 80, 227-28, 235. At first she thought that SSA was involved with NTU's request, but, having worked for SSA in the distant past, she considered it unlikely that SSA would sponsor a private solicitation for funds. So she called SSA to inquire. *Id.* Thus, the I.G. has not only shown that NTU's mailing "could be interpreted" as conveying a false impression (satisfying the "low threshold" set by the statute), but has also shown that the mailing in fact confused its recipient, enticing her to open it, read its contents, and call SSA. Had the envelope not referred to SSA, she would have discarded it, unopened.[12]

---

12. Ms. Fischer's inclination to discard such mail illustrates Congress' additional concern about the effect of deceptive

(Cont'd)

brought the mailer into compliance with section 1140. The mailer continued to use the term "Social Security" as "part of an overall design" that conveys the impression that the mailer contains an important Social Security document (the survey) sent on behalf of official government sources. This violates section 1140. *See United Seniors Association*, 423 F.3d 405.

Laura Fischer is a retiree receiving Social Security benefits. P. Ex. 34, at 1 (Fischer Decl. ¶ 1). She has had no association with NTU, but a copy of Version 2 was mailed to her in about June 2002. *Id.* at 2 (Fischer Decl. ¶¶ 4, 5). She testified, credibly, that she does not generally open such solicitations, but she opened this one because of the bold red reference to Social Security and because it indicated that a "certified survey" was enclosed. *Id.* at 2 (Fischer Decl. IT 4). Tr. 80, 227-28, 235. At first she thought that SSA was involved with NTU's request, but, having worked for SSA in the distant past, she considered it unlikely that SSA would sponsor a private solicitation for funds. So she called SSA to inquire. *Id.* Thus, the I.G. has not only shown that NTU's mailing "could be interpreted" as conveying a false impression (satisfying the "low threshold" set by the statute), but has also shown that the mailing in fact confused its recipient, enticing her to open it, read its contents, and call SSA. Had the envelope not referred to SSA, she would have discarded it, unopened.[12]

---

12. Ms. Fischer's inclination to discard such mail illustrates Congress' additional concern about the effect of deceptive

(Cont'd)

Appendix C

Version 3.

After receiving the LG.'s November 7, 2002 cease-and-desist letter, NTU mailed out a third version of the solicitation/survey. P. Ex. 19, at 1; R. Ex. 3.

- Written on the outside of Version 3, in even larger underlined bright red capital letters is: "***OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY***." As in Version 2, immediately beneath that, in smaller capital letters, is "COMMISSIONED BY THE NATIONAL TAXPAYERS UNION FOR WHITE HOUSE AND CONGRESS OF THE UNITED STATES."

(Emphasis in original).

- Again, when the flyer is opened, it leads to a page with the NTU logo and **NATIONAL TAXPAYERS UNION** in bold letters.

  Immediately below that, in red, capitalized italics, is: ***REQUIRED NOTIFICATION AND DISCLAIMER:***

(Cont'd)
mailers. People are so inundated with "official" mail that they are not able to distinguish genuine correspondence from SSA, and are more likely to discard it, seriously hampering SSA's ability to communicate with its constituents. *United Seniors Association*, 423 F.3d at 399. *See also SSA v. United Seniors Association*, DAB CR1075, at 4-5 (2003); House Comm. on Ways and Means, 102d Cong., 2d Sess., Report on Deceptive Solicitations 5 (Comm. Print 1992).

> Then, in capital letters: THE NATIONAL TAXPAYERS UNION IS LEGALLY RECOGNIZED AND REGISTERED AS A NOT FOR PROFIT ORGANIZATION BY THE UNITED STATES GOVERNMENT. THIS ORGANIZATION IS INDEPENDENT FROM SAID GOVERNMENT AND RECEIVES NO FUNDING OR SUPPORT OF ANY KIND BY THE U.S. GOVERNMENT, ITS AGENCIES OR ANY OF THE BRANCHES THEREOF. MOREOVER, THE ENCLOSED **OFFICIAL NATIONWIDE OPINION POLL ON SOCIAL SECURITY** *IS SPONSORED BY SAID ORGANIZATION TO INSURE THAT CERTAIN VIEWPOINTS HELD BY THE GENERAL PUBLIC ARE FAIRLY AND ACCURATELY REPRESENTED.*

(Emphasis in original). P. Ex. 19, at 3; R. Ex. 3. Even if this were a credible disclaimer, the statute explicitly precludes me from considering a disclaimer in determining a violation under section 1140. Determination of a violation "shall be made without regard to any inclusion in such item . . . of a disclaimer of affiliation with the United States Government or any particular agency or instrumentality thereof." Act, § 1140(a)(3).

Moreover, the disclaimer paragraph is more an exercise in obfuscation than a legitimate disclaimer. First, NTU claims legal recognition and registration by the U.S. government, which suggests some official government sanction beyond that afforded a typical non-profit

organization. The next sentence, though, disavows any financial connection with the government. Then comes the reference, in bold, to the **OFFICIAL NATIONWIDE OPINION POLL ON SOCIAL SECURITY**, sponsored, not by NTU, but by "said organization." The antecedent for "said organization" is ambiguous. Careful parsing of the passage suggests that it refers to NTU, but the more casual reader could easily conclude that it refers to SSA, or some other government agency or branch. *See* P. Ex. 37, at 10-11 (Arnold Decl.)

- The next paragraph confuses the reader even more, suggesting that NTU's poll has been sponsored or endorsed by both the legislative and executive branches of government, or, as SSA argues, that NTU is working with the President and Congress to conduct the survey. It reads: *ACKNOWLEDGMENT*: IT IS FURTHERMORE HEREIN ACKNOWLEDGED THAT SAID **OFFICIAL NATIONWIDE POLL ON SOCIAL SECURITY** HEREIN CONTAINED WAS COMMISSIONED FOR THE PRESIDENT OF THE UNITED STATES, THE HONORABLE GEORGE WALKER BUSH, AND MEMBERS OF THE UNITED STATES CONGRESS.

- The next section repeatedly addresses the recipient by name, advises her that the branches of government are formulating new policies for the "**SOCIAL SECURITY PROGRAM**," that will have a "*profound effect*" on her retirement benefits, eligibility requirements, and the manner in which

> the program is administered. The mailer tells her that her views "*will influence* those policies and changes" but that she "**MUST PARTICIPATE by filling-out and returning the *Official* Nationwide Opinion Poll on Social Security.**" The letter then repeats that she was selected because of her "eligibility status."

Again the reference to the recipient's eligibility status suggests that NTU obtained confidential infatuation from SSA about this particular recipient. The admonition that she "must participate" suggests that her failure to do so could adversely affect her receipt of benefits. *See* P. Ex. 37, at 12 (Arnold Decl.).

NTU argues that I should require "a properly designed survey to establish whether the recipient class (the reasonable person) would understand the NTU solicitations to be government-sponsored." NTU Br. at 7. Of course, at approximately $ 100,000 per survey, such a requirement would render section 1140 virtually unenforceable. *See* Tr. 155. While such a survey might be admissible as evidence, and NTU was certainly free to conduct and submit the results of such a survey, nothing in the statutory language, regulations, nor case law suggests that SSA must do so in order to halt the blatant misuse of protected words and symbols. Indeed, the reviewing courts have unanimously affirmed the ALB's authority to determine violations without such evidence. *United Seniors*, 423 F.3d 397; *SSA v. National Federation of Retired Persons*, DAB No. 1885 (2003), *aff'd*, 115 Fed.Appx. 763, 2004 WL 2980374 (C.A.5).

Moreover, this argument — that a survey would show that no one could reasonably interpret the mailer as conveying a false impression of government involvement — would be in the nature of an affirmative defense, for which respondent bears the burden of going forward and the burden of persuasion. 20 C.F.R. § 498.215(b)(1). I note also that NTU has exclusive control over the recipient information necessary to conduct such a survey, information it did not share with the I.G., even in response to subpoenas (see SSA Reply at 11; Tr. 39-41), and was thus the only party in a position to undertake such a survey.

All three versions of NTU's Social Security mailer were designed to entice the recipient to open it, to send in a response, and to send money. Tr. 141. To achieve these purposes, the mailers are fraught with deliberately ambiguous and deceptive language that repeatedly includes the protected "Social Security" words. By any objective standard, NTU's use of those protected words conveyed the false impression that the mailers' contents were approved, endorsed, or authorized by SSA. The language used in the mailers also suggested that NTU had some connection with or authorization from SSA. The I.G. has thus established that NTU violated section 1140, without regard to what NTU knew or should have known about how its mailing would be interpreted. I next consider what NTU knew or should have known.

2. ***NTU knew or should have known that its solicitations conveyed or could reasonably have been interpreted as conveying the false impression that its mailings were approved, endorsed, or authorized by SSA, or that NTU had some connection with or authorization from that agency.***

In *SSA v. United Seniors*, Judge Kessel wrote:

> Respondent is a sophisticated mass marketer of ideas. Its life blood is its appeals to senior citizens on a range of social and policy issues. It has vast experience in making mass mailings. That sophistication makes it obvious that Respondent knew what it was doing when it designed the envelopes that are at issue in this case.

United Seniors, DAB CR1075, at 13 (2003), *aff'd* 423 F.3d 397 (4th Cir. 2005); *see also National Federation of Retired Persons*, DAB No. 1885, at 23, 28, *aff'd*, 115 Fed.Appx. 763, 2004 WL 2980374 (where Respondent deliberately and prominently displayed protected language on the outside of its mailings to induce recipients to open them, and where it used protected language on the inside to induce recipients to respond, it not only knew or should have known that its mailing created a false impression, it specifically designed those mailers to create that impression).

Appendix C

Judge Kessel's words also apply to NTU; it is an experienced mass marketer of ideas that knew exactly what it was doing when it designed the mailers in this case. Richard Geske is an experienced copywriter, well-versed in direct mail techniques.[13] He carefully and

13. Copywriter Geske was not a particularly credible witness. He attempted to circumvent even simple questions, and, at times, his spirited defense of NTU's actions bordered on the absurd. For example, notwithstanding the names of three governmental bodies on the outside of the mailer, Copywriter Geske refused to acknowledge that the envelope contained any reference to the government:

> Q. Do you see how it says, "Commissioned by the National Taxpayers Union for the Social Security Administration, White House and Congress of the United States"?
>
> A. Yes.
>
> Q. Okay, why did you make that reference to the government?
>
> A. Well, it's not a reference to the government, in my opinion . . .
>
> JUDGE HUGHES: Do you understand that the Social Security Administration is a government agency?
>
> THE WITNESS: Yes, I do.
>
> JUDGE HUGHES: And the White House is a government entity?
>
> THE WITNESS: Right.
>
> JUDGE HUGHES: As is the Congress of the United States?
>
> THE WITNESS: Yes.

(Cont'd)

deliberately chose the mailer language. He put on the outside of the mailer "***OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY***." He acknowledges that he chose this language "to get attention."

> The object of the text on the exterior of the mailer is to get attention. In writing a mailer like this, there is a risk that recipients will see it as "junk mail" and throw it away, and the use of bold lettering and messages on the exterior is designed to encapsulate the entire message so the recipient may decide quickly that it is worthwhile to read further.[14]

(Cont'd)

> JUDGE HUGHES: Okay, so it is a reference. I think we can all agree that this is a reference to the government.
>
> THE WITNESS: Well, actually, I think it's abundantly clear. It means that — exactly what it says. Here is a survey. The National Taxpayers Union is conducting this survey. And they had the authority to do this task — hence the word "commissioned" — for the Social Security Administration, blab, blab, blah.

Tr. 260-62.

14. NTU has argued that its mailers so resembled "junk mail" that no reasonable person would have considered it anything else. Copywriter Geske's testimony here — that he designed the outside of the mailer to distinguish it from "junk mail" so that the recipient would take it more seriously — undercuts that argument. Moreover, there is simply no "junk

(Cont'd)

R. Ex. 15, at 4-5 (Geske Decl. ¶10). When asked why the lettering "Official National Survey on Social Security," was even larger on Version 3 than the earlier versions, he said that he actually wanted the larger font size on all versions in order to "to bring attention to this particular piece." Tr. 289-90.

Copywriter Geske admitted that the survey was his idea; he came up with it as an "involvement technique," which he described as a technique, commonly used in direct mail, that is "proven" to increase responses. Tr. 252-53.[15] He included the personalized references and the language, "you or your spouse has paid into the Social Security system and are receiving or expect to receive

---

(Cont'd)

mail" exception to section 1140. Congress enacted section 1140 to address problems created by "direct mailers," i.e. purveyors of junk mail. *See Deceptive Mailings and Solicitations to Senior Citizens and Other Consumers: Hearing before the Subcomm. on Social Security, and the Subcomm. on Oversight of the House Committee on Ways and Means*, 102d Cong., 2d Sess. 124 (Comm. Print 1992) (1992 House Hearing); *Deceptive Solicitations, Including Findings and Recommendations of the Subcommittees*, H. R. Rep. No. 9, 102d Cong. 2d Sess. 45 (1992) (1992 House Report). A "junk mail" exception would devour the rule, leaving nothing.

15. On the other hand, he also claimed that NTU planned to use the survey as the "centerpiece" for its lobbying campaign. "The results of the survey were going to be collected, tabulated, and then used literally, again, as a centerpiece for their lobbying campaign." Tr. 254. But when reminded that NTU was not even aware of the survey, that he had concocted it to increase responses, he said "I can't answer for them." Tr. 254.

benefits in the future." He admitted that he did not actually know whether any particular recipient fell into this category; he assumed that most people did, and included the language because a higher degree of personalization is shown to increase response rates. Tr. 263.

Next, I find unconvincing NTU's assertion that it would deliberately have avoided any suggestion of an association with the government because its target audience is so hostile. The above discussion establishes, however, that Copywriter Geske deliberately included references to "Social Security," and, as Director Frank acknowledged, the Social Security program does not engender a negative response, even from those most hostile to government. Tr. 35-36. Moreover, NTU's mailers and some of its mailing lists suggest no animosity to the administration in power at the time. *See* P. Ex. 19, at 3; R. Ex. 3 ("COMMISSIONED FOR THE PRESIDENT OF THE UNITED STAPLES, THE HONORABLE GEORGE WALKER BUSH, AND MEMBERS OF THE UNITED STATES CONGRESS"); P. Ex. 19, at 8 ("The President of the United States, the Honorable George Walker Bush, the Honorable Members of the United States Congress . . . owe you a debt of gratitude and appreciation.")

I note finally that NTU knew or should have known that its mailers conveyed a false impression because the I.G.'s April 3, 2002 warning letter told them so when the I.G. attempted to elicit voluntary compliance. But NTU not did comply. Instead, it made minimal, cosmetic changes, and sent out Versions 2 and 3.

B. SSA proposes a reasonable penalty of 50¢ per violation ($274,582 total).

Having found that NTU violated section 1140, I must now determine an appropriate penalty. The statute and regulations authorize penalties of up to $5,000 for each piece of mail containing the violative language. Act, § 1140(b); 20 C.F.R. § 498.103.

Responding to a subpoena, NTU advised SSA that it sent out 549,164 of the mailers. P. Ex. 14.[16] The I.G. proposes imposing a penalty of 500 per mailer, for a total of $274,582. I am authorized to affirm, deny, increase, of reduce this amount. 20 C.F.R. § 498.220. In reaching my decision, I must consider the following factors: (1) the nature and objective of the advertisement, solicitation, or other communication, and the circumstances under which they were presented; (2) the frequency and scope of the violation and whether a specific segment of the population was targeted; (3) the prior history of the individual, organization, or entity in their willingness or refusal to comply with informal requests to correct violations; (4) the history of prior offenses of the individual, organization, or entity in their misuse of program words, letters, symbols, and emblems; (5) the financial condition of the individual or entity; and

16. NTU has provided numbers that do not exactly add up. *Compare* P. Ex. 14 with P. Ex. 16 (suggesting a total of 549,045 mailers sent — 205,663 Version 1 mailers + 291,968 Version 2 mailers + 51,414 Version 3 mailers). NTU has exclusive control of the figures, and can hardly complain that the I.G. has taken it at its word. So I accept the 549,164 figure.

(6) such other matters as justice may require. The use of a disclaimer of affiliation with the U.S. government, SSA, or its programs is not a mitigating factor in determining the amount of the penalty. 20 C.F.R. § 498.106.

I note, initially, that 50¢ per violation is a low penalty. *Compare United Seniors*, DAB CR1075, at 18 ($1.00 per envelope) and *National Federation of Retired Persons*, DAB CR968, at 3 ($1.00 per mailer).

1. Nature and objective of the solicitations and the circumstances under which they were presented.

As discussed above, NTU's solicitations were designed to increase its "membership"[17] and to raise money. Employing well-established marketing techniques, NTU deliberately employed protected language to induce recipients to open its mailers and to respond.

2. Frequency, scope of the violation, and whether a specific segment of the population was targeted.

NTU mailed 549,164 solicitations from January 2002 through February 2003. P. Exs. 14, 16. I consider this a substantial number of solicitations.

---

17. Recipients were not told that sending money made them members of NTU. Tr. 14. They were told that their contribution would "help . . . save Social Security" *See, e.g.*, P. Ex. 17, at 10. In fact, their contributions were simply added to NTU's general revenues. Tr. 44.

Appendix C

The elderly are among the most vulnerable in our population, and the group about whom Congress expressed the most concern when it enacted section 1140. SSA asserts that the elderly were targets of NTU's solicitations, which would justify an increased penalty. NTU denies that charge, claiming that it targeted a somewhat younger group, and selected names from mailing lists of those likely to share its views.

While NTU sent mailers to all of its "members" (see Footnote 17),[18] the objective data shows that it also specifically targeted the elderly. That data is found at P. Ex. 16 (*see also R.* Exs. 12, 13, and 14). The document is initially confusing because it includes figures for at least two additional mailers, which have nothing to do with this case (a "Fair Tax Insert Package" and an "Abolish the IRS" mailer). Pages 1-3, 7-9, and 12-14 of P. Ex. 16 (R. Ex. 12, at 1-3; R. Ex. 13, at 1-3; and R. Ex. 14, at 1-3) contain the data for those irrelevant mailers. The *relevant* data is at P. Ex. 16, pages 4-6 (containing Version 1 mailing information), pages 10-11 (containing Version 2 mailing information); and page 15 (containing Version 3 mailing information). *See also*, R. Ex. 12, at 4-6; R. Ex. 13, at 4-5; and R Ex. 14, at 4. Tr. 159 *et seq.*

Version 1: NTU sent solicitations to individuals selected from mailing lists provided by specific groups with which it had arrangements to share such lists. NTU mailed Version 1 to 148,238 individuals from selected mailing

18. NTU's former lobbyist, Alfred W. Cors, Jr., noted that the "average direct mail recipient and respondent" is a 70-year-old widow. Tr. 113.

lists (including some NTU internal lists) and 57,425 to individuals whose names were in NTU's "house file," for a total of 205,663 mailers sent. Tr. 166; P. Ex. 16, at 5, 6; R. Ex. 12, at 5, 6.[19] Of these 37,976 mailers were sent to individuals whose names were drawn from five group lists targeting senior citizens: Direct Mail Seniors[20] (providing two lists of 5,945 names and 19,253 names); American Seniors for Government Reform (providing two lists of 4,097 names and 5,290 names); and United Seniors Association PAC Donors (3,391 names). SSA Ex. 16, at 4; Tr. 163-65.

Version 2: NTU sent out 291,968 of the Version 2 mailers. Of those, more than half, 149,631 mailers, were

---

19. In his declaration, Director Frank agrees with the total, but divides it differently, stating that Version 1 was sent to 119,207 names selected from mailing lists and 86,456 names from NTU's own house file. R. Ex. 17, at 4 (Frank Decl. ¶ 9). (The house file consists of those who have previously responded to NTU solicitations. Tr. 37-38). NTU has not explained these figures, but it appears that in May 2002, NTU sent 57,425 mailers to individuals whose names were drawn. from its house file. P. Ex. 16, at 6. To that Director Frank adds earlier mailings sent to names drawn from NTU's internal lists: NTU Petition Signers/Nondonors (7,531 mailers); NTU Email Names from 1/02 (7,886 mailers); NTU Email Names from 2/02 (6,691 mailers); NTU Email Names Non-donors (835 mailers); and NTU Expires (6,088 mailers) for a total of 86,456. P. Ex. 16, at 4. The remaining 119,207 mailers were sent to names drawn from other lists.

20. According to its list manager, Direct Mail Seniors are "older Americans" who are "are genuinely concerned about the rights of senior citizens, and have donated to a campaign addressing Social Security and Medicare issues." R. Ex. 6, at 34.

sent to individuals whose names were drawn from groups targeting seniors: American Seniors for Government Reform (5,414 names); Seniors Against Benefit Cuts (18,814 names); Seniors Coalition (62,125 names); Seniors for Equitable Retirement (4,941 names); and Direct Mail Seniors (58,337 names). P. Ex. 16, at 10, 11; Tr. 167-69.

Version 3: NTU sent out 51,414 of the Version 3 mailers. These went exclusively to names drawn from either the house file or seniors organizations. 28,705 of the names were drawn from lists targeting seniors: Seniors for Equitable Retirement (4,047 names); Seniors Against Benefit Cuts (two lists of 3,620 names and 9,471 names); and American Seniors for Government Reform (11,567 names). P. Ex. 16, at 15; Tr. 170-71.

Thus 40% of the mailers were sent to individuals whose names were selected from senior citizen mailing lists (216,312 of 549,045).

Ryder T. Ulon is a "list broker." For the last six years, he has been NTU's exclusive account representative. His job includes identifying the best lists for NTU's mailings. R. Ex. 16. He testified that he selects the lists that he deems appropriate and he considers the content of the mailing in selecting the lists. Tr. 176, 184. He also claimed, unconvincingly, that he made "absolutely *no* effort to select retired persons, senior citizens, social security recipients or the like," and to bolster this claim, suggests that "Biker Magazine" provided one of the lists he used for the Social Security mailers. R. Ex. 16, at 1-

2 (Ulon Decl. ¶¶ 1-2, 6); R. Ex. 6; Tr. 179. But the data shows that, in fact, *none* of the Social Security mailers went to "Biker" listees. P. Ex. 16.

Broker Ulon's testimony is misleading because he did not limit himself to the lists he drew from for the Social Security mailers. He provides a long "list of lists" from which he purportedly selected names for the "3 NTU mailings (including the Social Security package)." R. Ex. 16, at 3 (Ulon Decl. ¶ 8). But in referring to the "3 NTU mailings" he does not mean the three versions of the Social Security mailing, which are the subject of this appeal. He means the Social Security mailer in all three forms *plus* the "Fair Tax" mailer and the "Abolish the IRS" mailer. So his "list of lists" tells us virtually nothing about where the violative mailings were sent. It only suggests that the recipient names were drawn from some of the listed organizations. And in fact, R. Ex. 5 and P. Ex. 16 show that the Social Security mailing was not sent to anyone from the Biker Magazine list. The "Fair Tax" mailer went to Biker Magazine list names. P. Ex. 16, at 2.

Broker Ulon also omitted from his "list of lists" an organization called Seniors Coalition, even though 62,125 Social Security mailer recipients were selected from that list. R. Ex. 16, at 3; Tr. 169; P. Ex. 16, at 11. The "Seniors Coalition" is described as "the premier direct mail seniors list in the industry!" That list is made up of individuals concerned about senior citizen issues. The "donors" are "age 60+," and the list is recommended for any mailer trying to reach "the mature

audience with disposable income." R. Ex. 6, at 19. Broker Ulon characterized his omission of the group as an "oversight." Tr. 169. But I find it strange that he would include Biker Magazine and multiple other organizations, to which NTU sent zero of the Social Security mailers, and omit an organization to which it mailed tens of thousands.

The evidence thus establishes that NTU targeted senior citizens for receipt of these mailers.

> *3.* ***The prior history of the individual, organization, or entity in their willingness or refusal to comply with informal requests to correct violations.***

While NTU was in the process of sending out Version 1, the I.G. notified NTU of its concerns, and sought voluntary compliance. P. Ex. 5. In a response that I consider less than straight-forward, NTU agreed to cooperate, and to change the package design so that it would not create the impression of SSA authorization. P. Ex. 6; *see* footnote 2, *supra.* But NTU's changes were superficial, and its subsequent mailers were violative, and it continued to send them out for almost a full year after receiving the I.G.'s letter.

4. The history of prior offenses of the individual, organization, or entity in their misuse of program words, letters, symbols, and emblems.

SSA concedes that NTU has no prior section 1140 offenses.

5. The financial condition of the individual or entity.

I am satisfied that the I.G. has carefully reviewed NTU's financial records, and correctly determined that NTU is capable of paying this penalty. For its part, NTU has not argued otherwise.

6. Such other matters as justice may require.

I am concerned about NTU's investigative tactics in this case. It was certainly within the organization's rights to interview the I.G.'s potential witnesses. However, NTU's private investigator, John Roche, went to Laura Fischer's home where he misrepresented himself, claiming that he represented the attorney for "Agora Publishing." R. Ex. 19; Tr. 226 *et seq.* I found wholly unconvincing his assertion that this was simply "my error." Tr. 240-41. Frankly, this action alone might have justified my increasing the penalty in this case, and, had the I.G. asked that I consider it, I would seriously have entertained the prospect.

V. Conclusion

For all of these reasons, I find that NTU has violated section 1140, and, under the authority granted me in 20 C.F.R. § 498.220, I affirm the $274,582 CMP proposed by the I.G.

s/ Carolyn Cozad Hughes
Carolyn Cozad Hughes
Administrative Law Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 9, 2009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-3381

NATIONAL TAXPAYERS UNION

Petitioner,

v.

UNITED STATES SOCIAL SECURITY ADMINISTRATION; OFFICE OF THE INSPECTOR GENERAL

Respondent.

SUR PETITION FOR PANEL REHEARING

Present: FUENTES, HARDIMAN and GARTH, Circuit Judges

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing by this panel, the Petition for Rehearing is hereby DENIED.

Appendix D

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: January 9, 2009

APPENDIX E — EXCERPTS FROM OPINION OF HHS DAB APPELLATE DIVISION IN *SOCIAL SECURITY ADMINISTRATION v. NATIONAL FEDERATION OF RETIRED PERSONS*

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

DATE: June 20, 2003

Civil Remedies CR968
App. Div. Docket No. A-03-16
Decision No. 1885

In the Case of:

Social Security Administration,

Petitioner,

- v. -

National Federation of Retired Persons,

Respondent.

RECOMMENDED DECISION ON REVIEW OF ADMINISTRATION LAW JUDGE DECISION

Appendix E

* * *

Discussion

NFRP makes numerous contentions to this appeal. We address them in the four sections below. Section A addresses the contentions regarding the ALJ's section 1140 liability findings. Section B addresses NFRP's contention that the ALJ abused her discretion by doubling the CMP proposed by SSA. Section C addresses NFRP's constitutional arguments. Finally, Section D addresses NFRP's contentions regarding the ALJ's evidentiary and other rulings.

A. *Section 1140 liability*

Section 1140 establishes two liability standards, which we refer to as the "knowledge standard" and the "reasonableness standard." A person violates section 1140 under the knowledge standard if he uses Social Security program words in a solicitation or other communication "in a manner which [he] knows or should know would convey . . . the false impression that such item is approved, endorsed, or authorized by the Social Security Administration[.]" Under the reasonableness standard, a person violates section 1140 if the communication "reasonably could be interpreted or construed as conveying" the false impression that it was approved, endorsed, or authorized by SSA. For narrative purposes, we first consider the ALJ's findings under the "reasonableness" standard.

Appendix E

1. Substantial evidence supports the ALJ's finding that the contested mailers "reasonably could be interpreted or construed as conveying the false impression" of SSA approval, endorsement, or authorization.

On its face, the reasonableness standard does not require SSA to establish that some person actually had a false impression that the communication was endorsed, approved, or authorized by SSA. Section 1140 requires only that a person of average intelligence "could" get such a false impression from inspecting the communication. In addition, section 1140 does not require a factual misrepresentation or proof that some person was actually deceived by the communication. It requires only that the communication leave or create a "false impression." An impression is "a notion, feeling, or recollection, esp[ecially] a vague one." Webster's New World Dictionary (2d College ed.).[2] A false impression, then, is a suspicion or vague notion based on an incomplete or erroneous understanding of the facts.

* * *

2. In the America Heritage Dictionary (4th ed. 2000), the primary definition of "impression" is "[a]n effect, feeling, or image retained as a consequence of experience." A secondary definition is "a vague notion, remembrance, or belief."

2. ***Substantial evidence supports the ALJ's finding that the NFRP knew or should have known that its mailers would convey the false impression proscribed by section 1140.***

Section 1140's knowledge standard is in fact a negligence standard. *See Huntzinger v. Hastings Mutual Ins. Co.*, 143 F.3d 302, 312 (7th Cir. 1998) ("knew or should have known" are words connoting a liability standard sounding in negligence); *Levine v. CMP Publishers, Inc.*, 738 F.2d 660, 672 (5th Cir. 1984). Thus, NFRP has violated section 1140 if it knew or, in the exercise of reasonable care, should have known that the mailers would create the false impression of official endorsement, approval, or . . .

* * *

C. ***Constitutional claims***

During the proceedings before the ALJ, NFRP contended that SSA's enforcement action amounted to an unlawful infringement of its First Amendment rights. *See* NFRP Motion for Summary Judgment. The ALJ declined to address this constitutional challenge, finding that she was bound to apply section 1140 and the accompanying regulations. *See* Rulings and Summary of Telephone Conference, dated April 16, 2002.

It is well-settled that administrative tribunals do not have the power to declare a statute or regulation unconstitutional. Sentinel Medical Laboratories, DAB

No. 1762 (2001). Section 498.204 of SSA's regulations reflects this principle, stating that an ALJ lacks the authority to "[f]ind invalid or refuse to follow Federal statutes or regulations." 20 C.F.R. § 498.204.

NFRP contends that section 498.204 does not apply because it is alleging only an "unconstitutional application" of federal law, not that the law is invalid. NFRP Brief at 97-98. However, the terminology used by NFRP in its argument calls to mind a claim that the statute and regulations are unconstitutional as applied. We interpret section 498.204 as precluding the ALJ from considering both facial and "as applied" challenges to the statute and regulations. Thus, to the extent that NFRP's contention is that section 1140 and its regulations are unconstitutional as applied, the ALJ committed no error in refusing to address it. In any event, as we now explain, the constitutional arguments made by NFRP are substantively meritless or constitute facial challenges to the statute that are beyond our authority to address.

* * *

No. 08-1245

In the Supreme Court of the United States

NATIONAL TAXPAYERS UNION, PETITIONER

v.

SOCIAL SECURITY ADMINISTRATION,
OFFICE OF THE INSPECTOR GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARK B. STERN
MATTHEW D. BURTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that Section 1140(a)(1) of the Social Security Act, 42 U.S.C. 1320b-10(a)(1), which prohibits communications that deceptively use the term "Social Security" and related words "in a manner which [the author] knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression" of endorsement by the Social Security Administration, may be applied to petitioner's conduct consistently with the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and regulation: Page

Miscellaneous:

In the Supreme Court of the United States

No. 08-1245

NATIONAL TAXPAYERS UNION, PETITIONER

v.

SOCIAL SECURITY ADMINISTRATION,
OFFICE OF THE INSPECTOR GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is not published in the *Federal Reporter* but is reprinted in 302 Fed. Appx. 115.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2008. A petition for rehearing was denied on January 9, 2009 (Pet. App. 58a-59a). The petition for a writ of certiorari was filed on April 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1140(a)(1) of the Social Security Act prohibits a person from "us[ing], in connection with any item constituting an advertisement, solicitation, * * *

or other communication," the term "Social Security" or related words—

> in a manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that such item is approved, endorsed, or authorized by the Social Security Administration * * * or that such person has some connection with, or authorization from, the Social Security Administration.

42 U.S.C. 1320b-10(a)(1).[1] A determination as to whether a communication comports with these strictures "shall be made without regard to any inclusion in such item * * * of a disclaimer of affiliation with the United States Government or any particular agency or instrumentality thereof." 42 U.S.C. 1320b-10(a)(3). An entity that violates Section 1140(a)(1) by sending a mass mailing is subject to a civil monetary penalty "not to exceed" $5,000 for each piece of offending mail. 42 U.S.C. 1320b-10(b); see 20 C.F.R. 498.103(c).

Congress enacted Section 1140(a)(1) to address its concern that "the number of mass mailing appeals to Social Security beneficiaries with inaccurate and misleading information was dramatically increasing." *United Seniors Ass'n* v. *SSA*, 423 F.3d 397, 399 (4th Cir. 2005) (internal quotation marks omitted), cert. denied, 547 U.S. 1162 (2006); see Staffs of the Subcomm. on

---

[1] Congress originally enacted the provision in 1988 as part of the Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 428(a), 102 Stat. 815. The law was amended in 1994 to reflect the Social Security Administration's newly independent status. See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 312, 108 Stat. 1526.

Oversight and the Subcomm. on Social Security of the House Comm. on Ways and Means, 102d Cong., 2d Sess., *Deceptive Solicitations* 3 (Comm. Print 1992) (*1992 Report*) ("During the past decade, soliciting senior citizens by deceptive means has become a big and lucrative business."). Congress found that there was "a proliferation of marketing techniques designed to give the public the false impression that they are dealing with a Government agency," and that "[m]any of these solicitations are targeted at the elderly who are particularly vulnerable to these unscrupulous practices." H.R. Rep. No. 7, 103d Cong., 1st Sess. 47 (1993).

In particular, Congress was concerned that "a number of individuals and organizations have adopted marketing techniques utilizing words, phrases, names, and symbols which give the public the impression that they are dealing directly with a Government agency or an organization endorsed by the Federal Government." *1992 Report* 1. "Such deception potentially interferes with the ability of the Government to effectively correspond with the public and increases the likelihood that true Government mailings will be destroyed without being opened." *Id.* at 5.

2. In 2002, the Social Security Administration (SSA) received a complaint about a mailing by petitioner, a non-profit corporation that engages in taxpayer advocacy. Pet. App. 2a. Among other things, the envelope for the mailing declared in underlined capital letters and in red ink that it contained an "*OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY.*" *Id.* at 29a. The envelope further indicated that the survey, which it described as "certified," had been "commissioned by [petitioner] for the Social Security Administration, White House and Congress of the United States." *Ibid.* The

envelope instructed recipients (in boldfaced capital letters) to "PLEASE OPEN *IMMEDIATELY* AND *KINDLY RESPOND* AS SOON AS POSSIBLE." *Id.* at 31a. It also purported to request from the postmaster "IMMEDIATE DELIVERY * * * IN ACCORDANCE WITH POSTAL REGULATIONS: DMM300.1.0." *Ibid.* No such postal regulation exists.

The text of the mailing identified the recipient by name and listed specific identifying information about the recipient. Pet. App. 33a. It stated in red, underlined, and capitalized text that "*YOUR NAME WAS SPECIFICALLY CHOSEN* to receive this *OFFICIAL SURVEY ON SOCIAL SECURITY*" because "you have a *VALID SOCIAL SECURITY NUMBER* and live in one of the *QUALIFYING ZONES* from which *we are required* to select at least *ONE* participant." *Id.* at 33a-34a. The mailing further indicated that petitioner was an "*authorized* sponsor" of the survey. *Id.* at 36a (emphasis added). The mailing closed with an exhortation to "do your part to help [petitioner] save Social Security by enclosing your donation." *Ibid.*

After making a preliminary determination that the communication violated Section 1140(a)(1), SSA sent petitioner a letter asking it to "cease and desist" from sending any additional communications that appeared to be authorized or endorsed by SSA. Pet. App. 19a. Petitioner indicated that it would revise the mailings to remove any impression of SSA authorization. *Id.* at 19a-20a. Petitioner then sent out thousands of additional mailings that omitted the language stating that the survey was commissioned for SSA, but continued to declare in red ink and in capital letters that it was an "*OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY*," that it had been "COMMISSIONED BY [PETITION-

ER] FOR THE WHITE HOUSE AND CONGRESS OF THE UNITED STATES," and that petitioner was the "authorized sponsor" of the survey. *Id.* at 37a, 52a. SSA concluded that the revised mailing was also misleading and, accordingly, sent a second cease-and-desist letter. *Id.* at 20a.[2]

Petitioner then sent out a third version of the mailing, which was materially similar to the second, except that it also included a disclaimer in capital letters stating, in part, that petitioner was "LEGALLY RECOGNIZED AND REGISTERED AS A NOT FOR PROFIT ORGANIZATION BY THE UNITED STATES GOVERNMENT" and was "INDEPENDENT FROM SAID GOVERNMENT." Pet. App. 39a-40a. This disclaimer was followed immediately by an assertion that "SAID OFFICIAL NATIONWIDE POLL ON SOCIAL SECURITY" was commissioned for the President of the United States and Congress. *Id.* at 41a.

SSA concluded that this third version of the mailing was likewise deceptive. Pet. App. 21a. In early May 2005, SSA sent petitioner a letter proposing a civil penalty of $274,582, or 50 cents for each of the more than 500,000 deceptive mailings that petitioner had sent. *Id.* at 3a, 21a.

---

[2] Although SSA requested that petitioner provide a written plan to comply with Section 1140(a)(1), petitioner declined to do so, and instead filed a pre-enforcement challenge in federal district court. Pet. App. 20a-21a. The district court dismissed the suit on the ground that the comprehensive adjudicatory scheme established by Section 1140 precluded pre-enforcement challenges. *Ibid.* The Fourth Circuit affirmed, and this Court denied the petition for a writ of certiorari. *National Taxpayers Union* v. *SSA*, 376 F.3d 239 (2004), cert. denied, 543 U.S. 1146 (2005).

3. Following a two-day hearing, an administrative law judge (ALJ) issued a decision authorizing the imposition of SSA's proposed penalty. Pet. App. 18a-57a. The ALJ heard testimony from numerous witnesses, including recipients of petitioner's mailings, the copywriter who designed the mailings, petitioner's president and other officers, and an expert in gerontology and surveys. Analyzing the text and appearance of the three mailings in detail, the ALJ found that all three mailings "use[d] the term 'Social Security' as 'part of an overall design' that conveys the impression that the mailer contains an important Social Security document (the survey) sent on behalf of official government sources." *Id.* at 38a; *id.* at 31a-43a. The text of each mailing repeatedly used prohibited terms in conjunction with language designed to sound official and to convey the impression that SSA authorized the survey. *Ibid.* In addition, petitioner's witnesses stated that they had deliberately used misleading language and personalized references to the recipients' benefits in order to increase the likelihood that recipients would open the mailings. *Id.* at 45a-48a. And despite SSA's repeated warnings, petitioner made only "minimal, cosmetic changes" to the mailers that did not remedy the fundamentally deceptive nature of the solicitations. *Id.* at 48a. Accordingly, the ALJ held that petitioner's solicitations deceptively conveyed the impression that SSA had authorized the mailings, in violation of Section 1140(a)(1), and that petitioner knew or should have known about the misleading effect that its solicitations conveyed. *Id.* at 43a-44a.

SSA's Departmental Appeals Board affirmed the ALJ's decision in April 2007. Pet. App. 4a. That decision became final in June 2007, and petitioner sought review of that decision in the court of appeals. *Ibid.*

4. In an unreported decision, the court of appeals affirmed SSA's decision and upheld the monetary penalty. Pet. App. 1a-14a. As relevant here, petitioner argued that Section 1140(a)(1)'s application to petitioner's conduct violated the First Amendment, on the ground that *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), requires a showing of intent to defraud before the government may limit speech. Pet. App. 5a. The court rejected that contention, reasoning that *Village of Schaumburg* "acknowledged that a direct and substantial limitation on protected activity is constitutional if it serves a sufficiently strong subordinating interest." *Ibid.* (citation and internal quotation marks omitted). The court found that Congress has a strong and substantial interest in protecting Social Security recipients from deceptive practices like petitioner's, and in ensuring that such mailings do not encourage recipients to discard communications actually sent by SSA. *Id.* at 5a-6a.[3]

ARGUMENT

Petitioner renews its contention that Section 1140(a)(1) is unconstitutional as applied to its conduct, arguing that the court of appeals' decision conflicts with *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), and subsequent decisions of this Court. The court of appeals' decision is correct, and it does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

---

[3] The court also rejected petitioner's facial challenge to the statute; its argument that the monetary penalty violated the Eighth Amendment; and its *Daubert* challenge to the government's expert witness. Pet. App. 6a-14a. Petitioner does not renew those contentions before this Court. See Pet. 8-10; Pet. App. 9a.

1. Section 1140(a)(1) bars the use of the term "'Social Security' * * * in a manner which [the author] knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that such item is approved, endorsed, or authorized by [SSA]." 42 U.S.C. 1320b-10(a)(1). As the court of appeals noted, insofar as use by charities is concerned, this provision requires "only that charities refrain from using deceptive language when soliciting." Pet. App. 6a. Private entities may say whatever they wish about Social Security or any other topic, so long as they do not use the term "Social Security" and related words "in a manner" that they know or should know would convey the endorsement of SSA. Section 1140(a)(1) thus does not prohibit petitioner from disseminating its chosen message, but simply regulates the *manner* in which petitioner may communicate.

This Court has previously characterized an analogous prohibition on the unauthorized use of certain words related to the Olympic Games as a time, place and manner restriction that may be upheld when tailored to a substantial government interest. See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 536 (1987) (noting that statute applied to non-commercial speech, but that it "restrict[ed] only the manner in which [the speaker] may convey its message," not the speaker's ability to convey its chosen message by using other words). In addition, even a "direct and substantial" limitation on charitable solicitation is valid if it serves a "sufficiently strong, subordinating interest." *Village of Schaumburg*, 444 U.S. at 636.

The court of appeals correctly concluded that "the government has a substantial interest in protecting So-

cial Security recipients from deceptive mailings" like petitioner's. Pet. App. 5a-6a (citing *Village of Schaumburg*, 444 U.S. at 636, which stated that protecting the public from deception is a "substantial" interest). Section 1140(a)(1) is designed to protect the line of communication between SSA and Social Security beneficiaries, and to "ensure that when the SSA sends legitimate mail to beneficiaries, the recipients will open it and not perceive it as 'junk mail.'" *Ibid.* (characterizing that interest as "strong [and] subordinating"). When Social Security recipients are bombarded with deceptive mailings, there is an "increase[d] * * * likelihood that true Government mailings will be destroyed without being opened," *1992 Report* 5, and that recipients who do open government mailings will be uncertain as to their legitimacy. In addition, because SSA is the recipient of confidential and sensitive information, it is critical that individuals participating in the program feel absolutely secure in their dealings with the Agency. Deceptive communications threaten to dampen that confidence. See *United Seniors Ass'n* v. *SSA*, 423 F.3d 397, 407 (4th Cir. 2005) (government has an "overriding" interest in preventing deceptive mailings targeting Social Security recipients), cert. denied, 547 U.S. 1162 (2006).

Petitioner's solicitations contain precisely the sort of misleading invocation of the term "Social Security" that Congress determined would harm SSA's relationship with Social Security recipients. The ALJ found that the mailings "were fraught with deliberately ambiguous and deceptive language" that petitioner knew or should have known conveyed the impression not only that petitioner's survey was authorized by SSA, Pet. App. 34a, 43a, but that petitioner had obtained confidential information about mailing recipients from SSA, *ibid.*, and

that failure to return the survey could adversely affect recipients' benefits, *id.* at 42a. The ALJ also concluded that petitioner is "an experienced mass marketer of ideas that knew exactly what it was doing when it designed the mailers," *id.* at 45a, and that it "deliberately employed protected language to induce recipients to open its mailers and to respond," *id.* at 50a. The ALJ's findings were based on the testimony of recipients of the solicitations, as well as the mailings' creator, who admitted to deliberately using Social Security-related terms in order to increase the chance that the mailings would be opened. *Id.* at 45a-48a.

Petitioner does not contest these findings, which demonstrate beyond doubt that the government has an overriding interest in preventing the harm arising from petitioner's deceptive mailings. SSA's application of Section 1140(a)(1) to petitioner's deceptive conduct directly supports the government's strong interests, and therefore does not infringe on legitimate First Amendment concerns. See *United Seniors Ass'n*, 423 F.3d at 407 ("[O]ne whose message is so deceptive and misleading that he should have known that the message conveyed the false impression of governmental endorsement" is "not entitled to First Amendment protection."); see also *San Francisco Arts & Athletics*, 483 U.S. at 539 (recognizing, in rejecting First Amendment claim, substantial public interest in preventing confusion in use of word "Olympics").[4]

---

[4] Amicus Free Speech Defense and Education Fund (FSDEF) contends (Br. 19-22) that the second prong of Section 1140(a)(1), which prohibits using the listed terms "in a manner which reasonably could be interpreted or construed" as conveying SSA's endorsement, has no meaningful limit. To the contrary, Section 1140(a)(1)'s use of an objective reasonableness standard cabins the reach of the statute. See

2. Petitioner contends (Pet. 8-10; see Amicus Br. 12-18) that *Village of Schaumburg*, 444 U.S. 620 (1980), and *Madigan* v. *Telemarketing Associates, Inc.*, 538 U.S. 600 (2003), permit the government to regulate only those charitable solicitations that involve "actual fraud." The only other court of appeals to consider that argument rejected it, see *United Seniors Ass'n*, 423 F.3d at 407, and in any event, petitioner's argument is meritless.

In *Village of Schaumburg* and its progeny, this Court applied its "strong, subordinating interest" test, 444 U.S. at 636, to invalidate a series of "prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded a specified reasonable level." *Telemarketing Assocs.*, 538 U.S. at 612. The Court did not suggest that only solicitations involving actual fraud may constitutionally be prohibited; rather, the Court simply invalidated the blanket prohibitions at issue in those cases because they were not adequately tailored to the government's interest in preventing fraud. *Id.* at 615; see *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988) ("[U]sing percentages * * * is not narrowly tailored to the State's interest in preventing fraud."); *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 966 (1984) (statute "operate[d] on a fundamentally

---

United Seniors Ass'n, 423 F.3d at 407-408; *Lebron* v. *Washington Metro. Area Transit Auth.*, 749 F.2d 893, 897 n.8 (D.C. Cir. 1984) (discussing reasonableness standard in the libel context). The fact that the burden is on the government to prove a violation, Pet. App. 26a, provides further protection. See *Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). In any event, the ALJ found, and petitioner does not contest, that petitioner knew or should have known that its mailings were deceptive within the meaning of Section 1140(a)(1)'s first prong.

mistaken premise that high solicitation costs are an accurate measure of fraud"); *Village of Schaumburg*, 444 U.S. at 636 (requirement that charities use at least 75% of their donations for charitable purposes served the government's interest "only peripherally").

Nor does *Telemarketing Associates* hold or suggest that the government may not target "representations made in individual cases," 538 U.S. at 617, unless those representations are made with fraudulent intent. The only question at issue in *Telemarketing Associates* was whether *Village of Schaumburg* "rule[d] out, as supportive of a fraud claim [brought by the Illinois Attorney General] against fundraisers, any and all reliance on the percentage of charitable donations fundraisers retain for themselves." *Id.* at 606. In upholding the State's complaint, the Court emphasized that the State's fraud claim was not based solely on the percentage of donations kept by the fundraiser, which would be impermissible, but instead was founded on allegations of specific knowing misrepresentations. *Id.* at 618. The Court did not consider the government's ability to prohibit deceptive solicitation where it need not rely on the percentage of donated funds retained, and the Court also noted that it 'confine[d] * * * consideration to the complaint in this case, which alleged" knowledge of falsity. *Id.* at 621 n.10.

Telemarketing Associates and the *Village of Schaumburg* line of cases thus do not suggest that the government can regulate a non-profit organization only by prohibiting actual fraud. See *United Seniors Ass'n*, 423 F.3d at 407. Moreover, under *San Francisco Arts & Athletics*, the government has a distinct and substantial interest in preventing confusion regarding suggestions of endorsement by or connections with the govern-

ment in communications regarding the Social Security program. 483 U.S. at 539-540. In declining to require a showing of fraudulent intent, Pet. App. 5a, the court of appeals did not contravene any decision of this Court, and further review is not warranted.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MARK B. STERN
MATTHEW D. BURTON
Attorneys

AUGUST 2009

---

[5] Amicus FSDEF raises an additional argument not within the question presented (Br. 22-26), namely, that the court of appeals' use of an unpublished decision to dispose of this case violated Article III. That contention is meritless. The fact that a case is disposed of without a formal published opinion "in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983) (per curiam); see *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) (courts of appeals "have wide latitude in their decisions of whether or how to write opinions").

(4)

No. 08-1245

IN THE

Supreme Court of the United States

NATIONAL TAXPAYERS UNION,

Petitioner,

v.

UNITED STATES SOCIAL SECURITY ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

JAMES E. MCCOLLUM, JR.
MCCOLLUM AND ASSOCIATES, LLC
7309 Baltimore Avenue
Suite 117
College Park, MD 20741
(301) 864-6070

MICHAEL E. GELTNER
Counsel of Record
GELTNER AND ASSOCIATES, PC
105 North Virginia Avenue
Suite 305
Falls Church, VA 22046
(703) 536-2334

Attorneys for Petitioner

224735

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

May the Third and Fourth Circuits overrule the holding of *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600 (2003) ("*Telemarketing Associates*") that the First Amendment allows punishment of charitable solicitation ***only*** for actual fraud?

REASONS FOR GRANTING THE PETITION

1. In Accordance with this Court's Decisions in *Schaumburg* and *Telemarketing*, the First Amendment Allows Punishment of Charitable Solicitation Only for Actual Fraud

According to the Social Security Administration, NTU's argument that this Court's First Amendment decisions in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600 (2003), allow punishment of charitable solicitation only for actual fraud, and that the court of appeals' decision conflicts with this Court's decisions, is "meritless." Brief in Opposition at 11.

The Social Security Administration's position, interestingly enough, supports the grant of the petition for writ of certiorari in this case.

The Social Security Administration joins issue with NTU regarding whether actual fraud is a *sine qua non* for punishing charitable solicitation under *Schaumburg* and *Telemarketing Associates*. Although the Social Security Administration is mistaken when it states that the foregoing cases from this Court do not "suggest that the government can regulate a non-profit organization only by prohibiting actual fraud," Brief in Opposition at 12, both parties agree that this case squarely presents the important constitutional issue as to whether the government can punish charitable solicitation on less than a showing of actual fraud. It is undisputed that the court of appeals has punished NTU's charitable

solicitation on far less than a showing of actual fraud. The Social Security Administration argues that it can punish charitable organizations on less than a showing of actual fraud, contrary to this Court's decisions in *Schaumburg* and *Telemarketing Associates*. This is an important issue regarding the First Amendment and deserves this Court's consideration.

2. The Social Security Administration's Fact Findings from the Administrative Hearing are Flawed in Accordance with this Court's Jurisprudence

The Social Security Administration states that NTU does "not contest these findings, which demonstrate beyond doubt that the government has an overriding interest in preventing the harm arising from petitioner's deceptive mailings." Brief in Opposition at 10. This is not correct.

NTU pointed out to the court of appeals that it had an "obligation independently to examine the whole record to ensure 'that the judgment does not constitute a forbidden intrusion on the field of free expression,'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984),[1] and the court of appeals ignored its obligation. The court of appeals also ignored the argument NTU raised that, because the ALJ who made the findings of fact (and announced that "SSA is correct that I have no authority to review constitutional issues."[2]) was an executive branch employee, the entire administrative proceeding was tainted by violation of Article III's

1. NTU 3rd Circuit Br. at 16.

2. *Id.* at 31, n. 9; quote in court of appeals appendix at A91.

separation of powers requirement.[3] The court of appeals also ignored NTU's argument that, because the legislative intent was wholly deterrent, the penalty proceeding was punitive under *United States v. Halper*, 490 U.S. 435 (1989) and could not occur before an administrative agency. [4]

Therefore, any suggestion that those factual findings somehow relate to a proper analysis in accordance with this Court's First Amendment jurisprudence is a fiction of the highest and grossest degree.

---

3. *Id.* at 35-6, relying on *Tennessee Valley Auth. v. Whitman*, 336 F. 3d 1236, 1259 (11th Cir. 2003) and *Noriega-Perez v. United States*, 179 F. 3d 1166, 1175 (majority), 1184 (Judge Ferguson dissent) (9th Cir. 1999), interpreting *Northern Pipeline v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

4. NTU 3rd Circuit Br. at 27-33. Because the court of appeals ignored NTU's arguments and wrote an unpublished opinion addressing miscast arguments, NTU concluded it could not responsibly present these process issues here in its petition for a writ of certiorari.

CONCLUSION

The Court is requested to grant the writ of certiorari.

Respectfully submitted,

MICHAEL E. GELTNER
Counsel of Record
GELTNER AND ASSOCIATES, PC
105 North Virginia Avenue
Suite 305
Falls Church, VA 22046
(703) 536-2334

JAMES E. MCCOLLUM, JR.
MCCOLLUM AND ASSOCIATES, LLC
7309 Baltimore Avenue
Suite 117
College Park, MD 20741
(301) 864-6070

Attorneys for Petitioner

(2)

No. 08-1245

IN THE
Supreme Court of the United States

NATIONAL TAXPAYERS UNION,
Petitioner,

v.

SOCIAL SECURITY ADMINISTRATION,
OFFICE OF THE INSPECTOR GENERAL,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF AMICUS CURIAE OF FREE SPEECH DEFENSE AND EDUCATION FUND, FREE SPEECH COALITION, *ET AL.* IN SUPPORT OF PETITIONER

MARK WEINBERG
WEINBERG & JACOBS
11300 Rockville Pike
Suite 1200
Rockville, MD 20852
(301) 468-5500

WILLIAM J. OLSON*
HERBERT W. TITUS
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
Attorneys for Amici Curiae

**Counsel of Record*

May 11, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF AMICI CURIAE[1]

This *Amicus Curiae* Brief in Support of the Petitioner is submitted jointly on behalf of:
Free Speech Defense and Education Fund, Inc.,
Free Speech Coalition, Inc.,
The Abraham Lincoln Foundation for Public Policy Research, Inc.,
American Civil Rights Union,
American Conservative Union,
Americans for the Preservation of Liberty,
Concerned Women for America,
Conservative Legal Defense and Education Fund,
Downsize DC.org,
Downsize DC Foundation,
English First,
English First Foundation,
First Amendment Project,
Fitzgerald Griffin Foundation,
Freedom's Call, Inc.,
Gun Owners of America, Inc.,
Gun Owners Foundation,
Heritage Alliance,
The Lincoln Institute for Research and Education,
Media Research Center,
The National Center for Public Policy Research,
Public Advocate of the United States,
The Senior Citizens League,

---

[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice at least 10 days prior to the filing date of the intention to file this *amicus curiae* brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Traditional Values Coalition,
U.S. Border Control,
U.S. Border Control Foundation,
U.S. Constitutional Rights Legal Defense Foundation, and
Young America's Foundation
— all of which are nonprofit educational organizations public charities, and social welfare organizations, exempt from federal taxation under section 501(c)(3) or section 501(c)(4) of the Internal Revenue Code, whose purposes and activities include the participation in the American political process and the American marketplace of ideas, including the study of, and education and defense regarding, rights guaranteed under the United States Constitution — as well as:
American Target Advertising, Inc.,
ClearWord Communications, Inc., and
Eberle & Associates, Inc.,
which are among the for-profit organizations which help those nonprofit organizations to raise funds and implement programs, dedicated to the protection of First Amendment rights through the reduction or elimination of excessive regulatory burdens which have been placed on the exercise of those rights.

At issue in this case is the constitutionality of a statute — section 1140 of the Social Security Act, 42 U.S.C. section 1320(b)-10(a)(1) (hereinafter "section 1140") — which was misused to uphold significant penalties against the petitioner for engaging in core political speech, entitled to the strongest First Amendment protection possible. These *amici* submit that the court of appeals erred by failing to apply correctly certain precedents of this Court, and that the

decision of the court of appeals, if allowed to stand, would impede the free exercise of core political speech by persons and organizations critical of government policies and programs. These *amici* believe that their perspective on such issues may bring to the attention of the Court relevant matter not already brought to its attention by the parties, and that this brief may be of help to the Court.

SUMMARY OF ARGUMENT

The National Taxpayer Union's ("NTU") petition concerns the unconstitutional misuse of power granted by Congress to the Social Security Administration ("SSA") to censor a charitable solicitation designed to stir up grassroots support for a private investment alternative to Social Security. Seizing upon section 1140's prohibition against using the words, "Social Security," in a "manner which reasonably could be interpreted or construed as conveying the false impression that" NTU's solicitation was "approved, endorsed, or authorized" by SSA, the SSA imposed a fine of well over a quarter of a million dollars for a mailing critical of the Social Security program. In disregard of the natural assumption that no government agency would put out such uncomplimentary information about itself, the SSA concluded that NTU had violated the "reasonableness" standard of section 1140.

On an appeal alleging violation of NTU's First Amendment rights, the United States Court of Appeals for the Third Circuit cursorily reviewed the administrative record, and concluded that, since "the

government has a substantial interest in protecting Social Security recipients from deceptive mailings," there was no violation of NTU's rights to freedom of speech. National Taxpayers Union v. Social Security Administration (3rd Cir. 2008) ("NTU v. SSA"), p. 5a.[2]

This ruling conflicts directly with Illinois *ex rel.* Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003) where this Court established that the First Amendment permitted regulation of charitable solicitations only upon proof of actual fraud with all the attendant mens rea and procedural protections that are characteristic of a common law fraud prosecution. Ignoring the need for robust and wide-open debate, section 1140 places the SSA at the gateway into the marketplace of ideas, empowering unelected bureaucrats to keep out any communication that they believe to be an unreasonable intrusion upon their proprietary interest in the Social Security program, whether or not the author knew that its communication created a "false impression" that the ordinary recipient would think that the communication had been authorized by SSA.

Also, the court of appeals completely neglected to apply the First Amendment lessons prohibiting the application of a standard of "reasonableness" as a preventive measure against fraud in charitable solicitations, as set forth by this Court in the trilogy of Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State

---

[2] Pagination to Appendix A of Petitioner's Brief.

of Maryland v. Jos. H. Munson Co., 467 U.S. 947 (1984); and Riley v. Nat'l. Fed'n. of the Blind of N.C., Inc., 487 U.S. 781 (1988).

Finally, in a concerted effort to dampen the precedential effect of its superficial and erroneous application of this Court's authoritative precedents, the court of appeals panel slapped a "NOT PRECEDENTIAL" label on its opinion. While such action purports to prevent this decision from binding other panels in the Third Circuit, it does not hinder other courts from invoking the opinion in such as way as to "chill free speech." Nor does it allay suspicion that the court did not give the kind of careful thought and concern that comes with a published opinion. More fundamentally, it raises serious questions about the constitutional propriety of exercising judicial review without the attendant rules of accountability and obligation that follow from the "doctrine of precedent," as so brilliantly and extensively articulated in Anastasoff v. United States, 223 F.3d 898, 899-905 (8th Cir. 2000) by the esteemed and late Judge Richard S. Arnold of the United States Court of Appeals for the Eighth Circuit.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY FAILED TO COMPLY WITH THIS COURT'S MANDATE IN TELEMARKETING ASSOCIATES.

A. The Social Security Administration's Application of 42 U.S.C. Section 1320b-10 Censored the National Taxpayer Union's Message.

The Petition for Certiorari under consideration presents the Court with the question whether Congress has empowered a federal government agency to censor criticism of it by public policy organizations, by banning use of the names of the government agencies and programs where those words "**could** be interpreted or construed as conveying, the **false impression** that such item is approved, endorsed, or authorized by the government." (Emphasis added.) The statute in question, 42 U.S.C. section 1320b-10(a)(1), Social Security Act section 1140,[3] as amended

---

[3] "Sec. 1140(a)(1) **No person may use**, in connection with any item constituting an advertisement, **solicitation**, circular, book, pamphlet, or other communication ... alone or with other words, letters, symbols, or emblems— (A) the **words** 'Social Security', 'Social Security Account', 'Social Security System', 'Social Security Administration', 'Medicare', 'Centers for Medicare and Medicaid Services', 'Department of Health and Human Services', 'Health and Human Services', 'Supplemental Security Income Program', or 'Medicaid', the **letters** 'SSA', 'CMS', 'DHHS', 'HHS', or 'SSI'... in a manner which such person knows or should know would convey, or in a manner **which reasonably could be**

(hereinafter "section 1140") was used to accomplish this objective when the Social Security Administration ("SSA") fined the National Taxpayers Union ("NTU"), which had used both the agency's name (Social Security Administration) and program name (Social Security) in doing grassroots lobbying and fund raising. *See* Petition for Certiorari ("Pet. Cert."), pp. 3-5 and Appendix ("App.") A, pp. 2a-4a. Such administrative power is comparable to that exercised by the ancient English Star Chamber which was empowered to regulate trades, businesses, and elections, until it was abolished in 1641 by a law the "main effect of [which] was to establish ... a system of justice administered by the courts instead of by the administrative agencies of the executive branch of the government." *See* Sources of Our Liberties, p. 132 (Perry, R. and Cooper, J., eds.), p. 132 (American Bar Foundation Rev. ed.: 1978).

In this case, the sender of the NTU letter was clearly identified with a return address from the National Taxpayers Union, 108 N. Alfred Street, Alexandria, VA 22314, with a postmark showing that it was sent by a "Non-Profit Org." *See* Third Circuit Joint Appendix, p. A46. Furthermore, the letterhead on the letter inside the envelope was clearly that of the NTU. *See* Pet. Cert., App. C, p. 32a. Thus, even the Administrative Law Judge ("ALJ") concluded that "NTU's mailers do not purport to be *from SSA* itself." Pet. Cert., App. C, p. 29a (italics original).

---

interpreted or construed as conveying, the **false impression** that such item is approved, endorsed, or authorized by the Social Security Administration...." (**Emphasis** added.)

To provoke the recipients to open the envelope, the first version of the NTU mailing included carrier envelope language stating: "OFFICIAL NATIONAL SURVEY ON **SOCIAL SECURITY** COMMISSIONED BY THE NATIONAL TAXPAYERS UNION FOR THE **SOCIAL SECURITY ADMINISTRATION**, WHITE HOUSE AND CONGRESS OF THE UNITED STATES." Pet. Cert., App. C, p. 29a, p. 43 (emphasis added). The NTU's use of these two statutorily-sacrosanct phrases led the ALJ to find that "this language, **by itself**, [was] sufficient to establish a section 1140 violation since it **creates the impression** that NTU's survey has official sanction." *Id.*, p. 30a. Even after NTU eliminated "Social Security Administration" in its second version, leaving only the phrase "Social Security," the ALJ found "the continued ... use [of] the term 'Social Security'" impermissible in light of the overall design of the mailer. *Id.*, p. 38a.

Indeed, the ALJ found fault with all three versions of NTU's mailers on the ground of NTU's "repeated" use of the "protected 'Social Security' words ... established that NTU violated section 1140, without regard to what NTU knew or should have known about how its mailer would be interpreted."[4] Pet. Cert., App. C, p. 43a.

---

[4] The ALJ's reading of the carrier envelope is reminiscent of the human elf Buddy's reaction to the restaurant sign "World's Best Cup of Coffee" when first visiting New York — but Buddy's reaction was understandable, for he had grown up at the North Pole.

Completely missing from the ALJ's analysis is any reference to the substantive policy concerns expressed in the NTU mailers. The ALJ's failure to include a complete textual analysis appears to have been strategic, because it would have been extremely difficult to argue that a recipient reasonably could interpret that the NTU mailing had been authorized by SSA when it is chock-full of commentary critical of the way the Social Security program is being run:

- "SOCIAL SECURITY WILL BEGIN TO RUN OUT OF MONEY AS EARLY AS 2016" (3rd Cir. Joint App., p. A49);

- "the financial structure of Social Security ... MUST BE ADDRESSED NOW OR THE PROGRAM WILL GO BELLY-UP" (*id.*, p. A49);

- "No serious politician or government official any longer argues that Social Security ... [is] financially sound" (*id.*, p. A49);

- "NO ONE HAS A LEGAL RIGHT TO THE MONEY THEY CONTRIBUTE TO THE SO-CALLED SOCIAL SECURITY TRUST FUND" (*id.*, p.A50); and

- "there is no guarantee nor has there ever been with Social Security" (*id.*, p. A50).

All such language demonstrates that the NTU mailing could not possibly have created the impression that it came from a governmental source. Yet, the ALJ opinion, adopted without revision by the SSA, applied

section 1140 to only selected portions of the text, and in doing so, censored NTU's political and policy message. Ironically, by its exclusion from examination of NTU's critique of Social Security, the SSA has demonstrated the truth of the NTU letter's charge that "no one at the Federal Level ... wants to frighten current or future recipients by telling all the facts" (*id.*, p. A50). In silencing NTU's criticisms, the SSA violated NTU's First Amendment rights.

B. The Court of Appeals Decided an Important Question of Federal Law in Conflict with Telemarketing Associates.

The Rules of the United States Supreme Court counsel granting a petition for a writ of certiorari when a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). This petition presents such a case, as the court below improperly rejected petitioner's First Amendment claim in conflict with this Court's ruling in Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003).

Initially, some might think that Telemarketing Associates is not relevant to this case, but that would be a mistake. While section 1140 applies to communications generally, it identifies "solicitation[s]" as one of the five specifically-named communicative activities governed by its terms. Additionally, section 1140 is aimed at preventing and punishing communications that allegedly create a "false impression that [the communication] is approved,

endorsed, or authorized by the [SSA]." *See* section 1140(a)(1).

The ALJ's decision, adopted by SSA, reveals that the NTU mailing was considered by SSA to be a solicitation designed "to increase [NTU] membership and raise money." Pet. Cert., App. C, p. 18a. According to the ALJ, this particular mailing was launched as part of NTU's program of "direct mail solicitations 'to help' build and maintain grass roots support." Pet. Cert., App. C, p. 27a. Thus, the ALJ found that the references to "Social Security" and other "protected words" were designed "to entice recipients into opening them" (Pet. Cert., App. C, p. 30a), and to induce the recipients "to send [NTU] money." Pet. Cert., App. C, p. 43a. Indeed, the ALJ concluded that "[t]he mailer ... includes the inevitable, and repeated, requests for donations, along with the **ersatz** survey." Pet. Cert., App. C, p. 36a (emphasis added).

By cynically characterizing the NTU mailing as just another effort by a nonprofit corporation in pursuit of "Mammon," the ALJ — and by its affirmance, the SSA — has repeated the mistake that local and state government officials have oftentimes made, and against which this Court has severely admonished: "The First Amendment protects the right to engage in charitable solicitations[,] [because] 'charitable appeals for funds ... involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." Telemarketing Associates, 538 U.S. at 611-12. Not only did the NTU mailing convey important information about what it believed to be the precarious

financial state of the nation's Social Security program, it advocated politically-controversial "personal investment accounts" as a solution to the program's financial woes. (3rd Cir. Joint App., pp. A51-A52.) Yet, the SSA put the kibosh on NTU's disfavored views, imposing a fine in excess of a quarter of a million dollars, ostensibly on the ground that the NTU mailing "reasonably could be interpreted or construed as conveying the false impression that" NTU's message — as unmistakably critical as it was of Social Security — was "approved, endorsed or authorized by the [SSA]." *See* section 1140.

In Telemarketing Associates, this Court painstakingly explained that its well-known trilogy of cases,[5] recognizing the First Amendment's protection of charitable solicitations do not permit "prophylactic measures" designed "to combat fraud by imposing prior restraints on solicitation" based upon a standard of "reasonable[ness]." Telemarketing Associates, 538 U.S. at 612. Instead, the Court explained that its holdings in Schaumburg, Munson, and Riley stand for the First Amendment principle that government efforts to fight fraud by regulation must be aimed only at **actual fraud**, not by regulations "'aimed at **something else** in the hope that it would sweep fraud in during the process.'" Telemarketing Associates, 538 U.S. at 619-20 (emphasis added).

---

[5] *See* Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984); and Riley v. National Federation of Blind of N.C., Inc., 487 U.S. 781 (1988), discussed in section II, *infra*.

In a further effort to demarcate "the constitutional side of the line," the Telemarketing Associates Court identified five "prime" factors that distinguished an unconstitutional "prior restraint on solicitation, or ... regulation that imposes on fundraisers an uphill burden to prove their conduct lawful." *Id.*, 538 U.S. at 619-20.

First, the Court noted that "in a properly tailored fraud action the State bears the **full** burden of proof." *Id.* (emphasis added).

Second, the Court stressed that "[f]alse statement alone does not subject a fundraiser to fraud liability[;] [instead], the complainant must show that the defendant made a false representation of a material fact **knowing** the representation was false." *Id.* (emphasis added).

Third, "the complainant must demonstrate that the defendant made the representation with the **intent to mislead** the listener." *Id.* (emphasis added).

Fourth, "these showings must be made by **clear and convincing evidence**." *Id.* (emphasis added).

Fifth, "as an additional safeguard responsive to First Amendment concerns, an appellate court could **independently review** the trial court's findings." *Id.* at 621 (emphasis added).

Even though petitioner argued that Telemarketing Associates required the court of appeals to adhere to these First Amendment safeguards, the court below

made absolutely no effort to apply them. The court conducted no "independent review" to ascertain whether SSA had administered section 1140 in such a way as to establish that it had met its full burden of proving by clear and convincing evidence that the NTU made material misrepresentations, knowing them to be false, with the intention of misleading the recipients of its mailing. Instead, the court blithely tossed Telemarketing Associates aside with the observation that "[l]ike other forms of public deception, fraudulent charitable solicitation is unprotected speech." NTU v. SSA, p. 8a. Thus, the court of appeals dismissed NTU's First Amendment claims by simply stating that "the government has a substantial interest in protecting Social Security recipients from deceptive mailings." *Id.*, p. 5a.

By its summary dismissal, the court of appeals treated the SSA as if it were completely impartial in its assessment of the NTU mailing, interested only in protecting individual Social Security beneficiaries from being hornswoggled. *See* NTU v. SSA, pp. 5a-6a. But the very "nature of bureaucracy belies the old idea that it is apolitical." *See* H. Schlossberg, Idols for Destruction, p. 121 (Thomas Nelson, Nashville: 1983). Indeed, would it be any wonder if the SSA would look differently upon a fundraising effort by admirers of the Social Security Administration than critics like NTU? Without the First Amendment safeguards employed by this Court in Telemarketing Associates, the powers of section 1140 are much too great to entrust, without significant First Amendment safeguards, to the SSA.

C. The First Amendment Requires Proof of Knowing Falsity or Reckless Disregard of the Truth in the Application of Section 1140 to NTU's Charitable Solicitation.

As this Court observed in Telemarketing Associates, the court of appeals' cursory assessment and deferential dismissal of the First Amendment as applied to NTU's Social Security mailings does not "provide sufficient breathing room for protected speech." *Id.*, 538 U.S. at 620. Citing both New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) and Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 498-511 (1984), this Court has extended the "exacting proof requirements," that are imposed upon "actual malice" determinations in defamation cases involving public officials, to actions against allegedly fraudulent charitable solicitations. *See* Telemarketing Associates, 538 U.S. at 620-21. Indeed, in New York Times, this Court observed that its "duty is not limited to the elaboration of constitutional principles; we must also [make] certain that those principles have been constitutionally applied." New York Times, 376 U.S. at 285. Further, the Court stated that this rule has "particular" application in those cases drawing a line between protected and unprotected speech. *Id.*

Under the peculiar mechanism of section 1140, this case did not come to the court of appeals from a federal district or state trial court. Rather, it came directly to the court of appeals from the Departmental Appeals Board of the Department of Health and Human Services, which, in turn, had conducted a review of an

ALJ decision "limited to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained an error of law." *See* NTU v. SSA, p. 16a. Thus, the court of appeals was twice removed from the forum in which the findings of fact and conclusions of law were initially made.

Additionally, the trier of fact was not part of the judicial department of government, but part of the executive branch. Not only that, but the trier of fact was part of the executive branch whose "proprietary interest" in the use of the words, "Social Security," was at stake. By vesting power in the Department of Health and Human Services to impose a fine — which it would be required to deposit into the account it administers — "of up to $5,000 ... for each violation" — where each piece of mail containing one or more words, letters, symbols, or emblems in violation of section 1140(a) constitutes "a separate violation"[6] — Congress has failed to provide the kind of impartial, independent judicial review required of a "censorship

---

[6] Section 1140. "(b) The Commissioner ... may, pursuant to regulations, impose a **civil money penalty not to exceed— ... $5,000**... against any person for each violation .... In the case of any items ... consisting of pieces of mail, **each such piece of mail** which contains one or more words, letters, symbols, or emblems in violation of subsection (a) **shall represent a separate violation**....

(c)(2) ... Amounts recovered under this section shall be paid to the Secretary and ... to the extent that such amounts are recovered under this section as penalties imposed for misuse of words, letters, symbols, or emblems relating to the Social Security Administration, such amounts shall be **deposited** into the **Federal Old-Age and Survivors Insurance Trust Fund**...." [Emphasis added.]

proceeding." *See* Freedman v. Maryland, 380 U.S. 51, 57-59 (1965).

Congressional protection of the proprietary interest of the SSA in the phrase "Social Security" and its variants — like legislative protection of the interest of government officials in their reputations — does not contribute to the "unfettered interchange of ideas for the bringing about of political and social change desired by the people." *See* New York Times, 376 U.S. at 269. To the contrary, SSA's proprietary oversight pursuant to section 1140 conflicts with the First Amendment's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.*, 376 U.S. at 270. Indeed, section 1140 places SSA as the gatekeeper of the marketplace of ideas, and empowers the SSA to judge the rightness of its own cause pursuant to a standard that would deny entry to that marketplace if the SSA found that a particular charitable solicitation "reasonably could be interpreted or construed as conveying, the false impression that such item is approved, endorsed, or authorized by the SSA...." *See* section 1140.

Additionally, section 1140 is predicated upon the proposition that a charitable solicitation "forfeits [First Amendment] protection by the falsity of some of its factual statements," just as was the case in New York Times. *See id.*, 376 U.S. at 271. But as the New York Times Court observed, "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth — whether administered by judges, juries, or

administrative officials." *Id.* (emphasis added). Otherwise, the Court concluded, America's government would no longer be republican in nature, the people having ceded "censorial power ... in the Government over the people." *Id.* at 275. Thus, the Court decided that the First Amendment protected the merely "erroneous statement," which it found "inevitable in free debate,"[7] disallowing only those statements proved to be "made with '**actual malice**' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, 376 U.S. at 279-80 (emphasis added).

This same standard was embraced by this Court in Telemarketing Associates in recognition that — whether the government is protecting its reputation, as in the case of libel of a public official, or protecting the informed choice of donors — the standard of knowing falsity, with all its attendant safeguards, is required by the First Amendment. Surely, such a standard is equally necessary in the case of efforts by the government to secure its proprietary interest in the popular name of a public program, lest the government squeeze communications critical of such programs out of the constitutionally-guaranteed marketplace of ideas.

---

[7] *Id.*, 376 U.S. at 271.

II. BY MISAPPLYING SCHAUMBURG, AND IGNORING MUNSON AND RILEY, THE COURT OF APPEALS ERRONEOUSLY PERMITTED PUNISHMENT OF FREE SPEECH.

The petitioner contended below that section 1140(a)(1) suffered from a defect similar to the regulatory programs struck down in the 1980's trilogy of cases establishing the Court's parameters for government regulation of charitable solicitations: Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984); and Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988). The court of appeals dismissed the argument out of hand, without even a mention of Munson or Riley.

According to the court of appeals, Schaumburg allows a "direct and substantial limitation on protected activity" if "it serves a sufficiently strong, subordinating interest." (Schaumburg, at 636.) Without any analysis, the court below simply assumed that section 1140 met this standard by purportedly protecting seniors and other beneficiaries from fraud, and ensuring that SSA's "legitimate" mail will not be perceived by recipients as "junk mail." *See* NTU v. SSA, pp. 5a-6a.

The court of appeals misread Schaumburg. Although the city ordinance in question there was allegedly designed to prevent fraud against the citizenry, it was determined to be unconstitutional

because it was not tailored narrowly to prohibit actual fraud, the only permissible standard under the First Amendment. Under the court of appeals' misreading of Schaumburg, virtually any kind of communication to the public using the magic words **could** be misread by someone and punished under section 1140(a)(1)'s "reasonableness" standard as having created a "false impression." *See* Pet. Cert., p. 8 and n.19. The First Amendment requires a more precise line than the "impressionistic" one embraced by an Administrative Law Judge so easily swayed by any verbal references to "Social Security."[8] *See, e.g.*, Pet. Cert., App. C, p. 29a.

Had the court of appeals not confined its examination to one aspect of Schaumburg, and had it not ignored Munson and Riley, it could not have summarily dismissed NTU's constitutional claim. In those two cases, respectively, the Maryland and North Carolina governments argued that there was a supposed nexus between fraud and the amount of a charity's solicited funds retained by the solicitor — the greater amount of money retained, the greater likelihood of fraud. This Court rejected this facile approach, concluding that no such lawful nexus existed. *See* Munson, 467 U.S. at 950, and Riley, 487 U.S. at 793.

---

[8] Under the myopic view of the ALJ, if these *amici* were to mail a copy of this *amicus curiae* brief in an envelope bearing the teaser "Critical information about your Social Security benefits," section 1140 could be invoked by the SSA to censor their voices as well.

In Riley, the Court explained why the reasonableness standard does not provide adequate First Amendment protection for charitable solicitations:

> According to the State, we need not worry over ... standards for determining "**[r]easonable** fundraising fees [which] will be judicially defined over the years".... Speakers, however, cannot be made to wait for "years" before being able to speak with a measure of security.... And, of course, in every such case, the **fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder**, even if the fundraiser and the charity believe that the fee was in fact fair. **This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates**. *See Munson*, *supra*, at 467 U. S. 969; *New York Times Co. v. Sullivan*, 376 U. S. 254, 376 U. S. 279 (1964). [Riley, 487 U.S. at 793-94 (emphasis added).]

Like the regulatory schemes held unconstitutional in Munson and Riley, section 1140(a)(1)'s "reasonableness" standard "necessarily chill[s] speech." Indeed, under section 1140(a)(1), NTU did not even get its day in an Article III court, as its words were previously parsed and judged by the very agency that NTU criticized in its mailings. To permit an agency with such a large stake in the outcome, vested with the power to impose a financial death sentence on the

"offending" nonprofit organization — without regard to whether that organization knew that its words created a "false impression," or did not care whether they actually deceived anyone — is the very essence of an unconstitutional abridgement of the First Amendment, and is at direct odds with the Schaumberg trilogy.

III. THE COURT OF APPEALS' UNPUBLISHED, NON-BINDING DECISION IS AN UNCONSTITUTIONAL EXERCISE OF FEDERAL JUDICIAL POWER OUTSIDE THE BOUNDS OF ARTICLE III.

The court of appeals marked its opinion as "NOT PRECEDENTIAL," thus having no binding precedential effect in the Third Circuit, and erroneously implying that it has no persuasive precedential effect. In response, NTU has concluded its petition with the final argument that "preventing the damaging fiction that [the court's decision] is not a precedent is itself sufficient reason to grant certiorari." Pet. Cert., p. 14. NTU fears — and for good reason — that by so labeling its opinion, the court of appeals will escape review by this Court and that later, notwithstanding its disclaimer, the opinion will still be cited as persuasive authority, chilling protected First Amendment speech. *Id.*, pp. 13-14.

Although the practice of labeling an opinion as "not precedential" is countenanced by Rule 32.1 of the Federal Rules of Appellate Procedure and the Internal Operating Procedures of the U.S. Court of Appeals for the Third Circuit, there are good reasons for this Court to review this case as an exercise of its supervisory

power over lower federal courts. *See* Rule 10(a), Rules of the Supreme Court.

First, there are neither principled guidelines governing whether an opinion should be designated "not precedential," nor nationally-applicable constraints limiting reliance on such an opinion as precedent. As the Notes of Advisory Committee on 2006 amendments to Rule 32.1 state:

> Rule 32.1 ... does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that determination. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as "unpublished" or "non-precedential" — whether or not those dispositions have been published in some way or are precedential in some sense. **It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court.** [*See* Notes of Advisory Committee on 2006 amendments to Rule 32.1 (italics original, bold added).]

Second, although the Third Circuit's Internal Operating Procedures attempt to limit the "not precedential" designation to only those opinions that "appear[] to have value only to the trial court or the parties," the opinion is nevertheless "posted on the court's Internet Website." Third Circuit Internal

Operating Procedures 5.3 (July 2002). It is also available in the Lexis and Westlaw legal databases (2008 U.S. App. LEXIS 25802, 2008 WL 5175066). Thus, the opinion is made readily available for use as precedent in all circuits even though the Third Circuit, "by tradition does **not cite to its not precedential opinions as authority,**" because "[s]uch opinions are **not regarded as precedents that bind the court,**" [having not been] circulate[d] to the full court before filing" *Id.*, 5.7 (emphasis added). The natural tendency in the writing of such opinions will be the absence of the same care and solemnity that would go into those opinions that are circulated to the full court before publication, and intended to be binding as precedent.

Third, since the 1970's, the circuits have treated opinions marked "not precedential" or "not for publication" differently — most circuits placed limits on the parties' ability to cite unpublished opinions, while some completely prohibited such citation (except in cases of issue preclusion). However, on December 1, 2006, Federal Rule of Appellate Procedure 32.1 became effective, which barred the circuits from prohibiting or restricting citation by parties of unpublished opinions issued after January 1, 2007, while still permitting circuits to designate opinions as unpublished or not precedential F.R.A.P. Rule 32.1. Thus, courts of appeals are still permitted to treat unpublished opinions as they see fit, ensuring discontinuity not only among the circuits, but among various judges on the courts of appeals.

Fourth, for the 12-month period ending September 30, 2008, fully 89.7 percent of the Third Circuit's opinions were marked as "NOT PRECEDENTIAL." Judicial Business of the United States Courts, 2008 Annual Report of the Director, Administrative Office of the U.S. Courts, Table S-3. Although this percentage is next to highest among the circuits, the overall percentage of unpublished opinions hovers around 82 percent. Such a high number of unpublished decisions should be a cause for alarm about the quality of the opinions, the accountability of the judges who write them, and the degree to which they are nevertheless relied upon.

As the late Judge Richard S. Arnold of the U.S. Court of Appeals for the Eighth Circuit summarized in an historical *tour de force* — the practice of designating an opinion to have no precedential effect puts in jeopardy the constitutional principles underpinning the proper exercise of judicial power:

> Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177-78, 2 L. Ed. 60 (1803). This **declaration of law** is authoritative to the extent necessary for the decision, and **must be applied in subsequent cases to similarly situated parties**. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991); *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 399, 5 L. Ed. 257 (1821). These principles, which form

> the **doctrine of precedent**, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to **derive from the nature of judicial power**, and intended that they would **limit the judicial power** delegated to the courts by Article III of the Constitution. **Accordingly, we conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional**. [Anastasoff v. United States, 223 F.3d 898, 899-900 (8th Cir. 2000) (vacated on other grounds) (emphasis added, footnote omitted).][9]

As NTU fears, the decision of the court of appeals in this case will be disregarded by nonprofit organizations at their peril. Notwithstanding its "NOT PRECEDENTIAL" mark, this case will assuredly "chill free speech."

---

[9] Significantly, Judge Arnold's research unearthed only one critic of the doctrine of precedent of judicial opinions — Thomas Hobbes, "who regarded the authority of precedent as an affront to the **absolute power** of the Sovereign." *Id.*, p. 900, n.6 (emphasis added).

CONCLUSION

In granting certiorari in this case, this Court could, and should, simultaneously place the lower federal courts under the constraint of precedent, and the Social Security Administration under the constraint of the First Amendment. For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MARK WEINBERG
WEINBERG & JACOBS
11300 Rockville Pike
Suite 1200
Rockville, MD 20852
(301) 468-5500

WILLIAM J. OLSON*
HERBERT W. TITUS
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070

Attorneys for Amici Curiae
**Counsel of Record*

May 11, 2009